90-1224

No.

Supreme Court, U.S.
FILED
JAN 29 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARK J. CONTRERAS, DONNA A. CONTRERAS, and ROBERT SCHMIDT,

Petitioners,

v.

CITIBANK (SOUTH DAKOTA), a National Banking Association, WILK & WALLER, an Illinois Partnership, RANDY KADET, SCOTT MARKS, MARILYN KADET, and ACCURATE PROCESS SERVICE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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QUESTIONS PRESENTED

1) Whether a person must exhaust all state court judicial remedies before bringing an action under 42 U.S.C. §1983.

2) Whether a person aggrieved by a void default judgment must establish a meritorious defense prior to its vacatur.

3) Whether a void state court judgment can be given collateral estoppel effect in a §1983 action seeking to collaterally attack that void judgment.

4) Whether a §1983 action can be used to collaterally attack a void judgment.

5) Whether a court-appointed process server engaging in blatant "sewer service" acts "under color of law" for purposes of 42 U.S.C. §1983.

PARTIES TO THE PROCEEDING

This Petition seeks review of the decision of the Appellate Court of Illinois, First Judicial District affirming the decision of the Circuit Court of Cook County, County Department, Chancery Division, in action No. 87 CH 10028. Petitioners, Mark J. Contreras and Donna A. Contreras (husband and wife) and Robert Schmidt were the plaintiffs in the trial court.

Respondents, Citibank (South Dakota) N.A., a National Banking Association, has its principal place of business at 701 East 60th Street North, Sioux Falls, South Dakota; Wilk & Waller, an Illinois law partnership, has its principal place of business at 77 West Washington Street, Suite 407, Chicago, Illinois; and Accurate Process Service, a sole proprietorship, Randy Kadet, Scott Marks, and Marilyn Kadet, all have their principal place of business at 6237 North Albany Street, Chicago, Illinois.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Mark Contreras and Donna Contreras (husband and wife) and Robert Schmidt ("Mark," "Donna," and "Robert," respectively, or Petitioners, collectively), respectfully pray that a Writ of Certiorari issue to review the judgment entered by the Appellate Court of Illinois, First Judicial District in this case.

OPINIONS BELOW

Relevant excerpts of the trial court's rulings may be found in the Appendix at 12-23. The opinion of the Appellate Court of Illinois, First Judicial District is reported at *Contreras et al. v. Citibank (South Dakota) etc., et al.*, 198 Ill. App. 3d 1059, 556 N.E.2d 751, 145 Ill. Dec. 133 (1st Dist. 1990) and is reproduced in the Appendix at 1-10. The Illinois Supreme Court denied Petitioner's Petition For Leave To Appeal on October 3, 1990, and said order is reported at *Contreras et al. v. Citibank (South Dakota) etc., et al.*, ____ Ill. 2d ____, 561 N.E.2d 688, 149 Ill. Dec. 328 (1st Dist. 1990). A copy of that order is reproduced in the Appendix at 11. No petition for rehearing was filed.

JURISDICTION

The judgment of the Appellate Court of Illinois is dated May 18, 1990. No Petition for Rehearing was filed. Petitioners timely filed a Petition For Leave to Appeal with the Illinois Supreme Court on June 22, 1990. The Illinois Supreme Court denied the Petition For Leave To Appeal in an order dated October 3, 1990. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

STATUTES INVOLVED

The issues in this case involves the interpretation of the following statutory provision:

> 42 U.S.C. §1983—Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

AN OVERVIEW

Petitioners are former credit account holders of Respondent Citibank who fell in arrears on their accounts and against whom Citibank initiated collection actions in the First Municipal District of the Circuit Court of Cook County, Illinois. In both collection suits, Citibank was represented by Respondent, Wilk & Waller, an Illinois law firm. After the Sheriff of Cook County filed his return indicating he was unable to effectuate service, Wilk & Waller employed Respondent Accurate Process Service

(an Illinois process serving company) to serve process. Wilk & Waller filed a motion to have either Respondent Randy Kadet or Respondent Scott Marks, employees of Accurate, appointed special process servers. Before the court could act on the motion and enter an order appointing Accurate, Kadet or Marks prepared a false affidavit of service; Respondent Marilyn Kadet (an notary public employed by Accurate) falsely notarized the affidavit of service; and Wilk & Waller filed the false affidavit of service with the clerk of the court. Thereafter, Wilk & Waller had the court enter an order appointing Kadet or Marks as special process server.

In both collection suits, the falsity of Accurate's return of service appeared on the face of the record insofar as the date and time of purported service set forth in the affidavit appended to the return fell sometime *after* the date and time stamp embossed on the return by the clerk of the court. Specifically, Kadet's return in Mark and Donna's case (*Citibank v. Contreras*, No. 87 M1 130654) was filed with the clerk of the court on July 2, 1987 at 9:56 a.m., but the affidavit showed service was had on July 13, 1987 at 7:27 p.m., some eleven days later. Kadet's return in Robert's case (*Citibank v. Schmidt*, No. 87 M1 102541) was filed with the clerk of the court on April 10, 1987, at 11:20 a.m., but the affidavit showed service was had on April 10, 1987 at 6:05 p.m., some six hours later. Copies of both returns can be found appended to Petitioner's Motion For An Extension of Time In Which to File A Petition For a Writ of Certiorari, filed with Honorable Court on December 26, 1990, Application A-896.

In both collection suits, a default judgment was entered against the petitioners based upon the false return of service. The default judgments included the amounts purportedly due Citibank, attorneys fees and court costs. Wage

garnishments were initiated. Wages were withheld from Mark and Robert.

OTHER PROCEEDINGS IN *CITIBANK v. CONTRERAS* DEEMED RELEVANT BY THE APPELLATE COURT

Upon learning of the wage garnishment, Mark and Donna contacted an attorney who filed a motion in the municipal court to vacate the default judgment. At the hearing on the motion, Mark and Donna argued proof of service was lacking on the face of the record and the default judgment must be vacated as void. The municipal court was more concerned with whether Mark and Donna had a meritorious defense, and seemed to suggest the default judgment would not be vacated in the absence of one. Thereupon Mark and Donna's attorney proffered 21 certified copies of similarly false affidavits of service, i.e., same plaintiff, same attorneys, same process servers and all filed with the clerk of the court some significant period of time before the time of purported service. The municipal court thereafter continued hearing on the motion to vacate for two weeks. A copy of the transcript of this hearing can be found in the Appendix at 12-17. During the two week interval, Wilk & Waller readily agreed that the default judgment against Mark and Donna should be vacated and declared void. On October 15, 1987, at approximately 2:00 p.m., the parties returned before the municipal court and entered an agreed order reciting: Kadet's affidavit of service was false; service was quashed; the court attained no jurisdiction over Mark and Donna; the default judgment was void; the wage deduction against Mark's employer was recalled. A copy of that order can be found appended to Petitioner's Motion For An Extension of Time In Which to File A Petition For a Writ of Certiorari, filed with Honorable Court on December 26, 1990, Application A-896.

OTHER PROCEEDINGS IN *CITIBANK v. SCHMIDT* DEEMED RELEVANT BY THE APPELLATE COURT

Unlike Mark and Donna, Robert was not represented by an attorney in the municipal court and did not uncover the phony affidavit or the fraud perpetrated upon him. After the wage garnishment was initiated and wages deducted, Robert paid the balance of the judgment (including court costs and attorney's fees) to Citibank and procured a release from Wilk and Waller. Robert was originally contacted to provide an affidavit in Mark and Donna's case, and later consented to be a class action plaintiff.

THE CLASS ACTION

Attorneys for the Petitioners have identified 34 other cases involving the Respondents wherein patently fraudulent service was used to procure default judgments which resulted in garnishments. In each case, the affidavit of service was filed with the clerk of the court prior to the time of purported service. (The Illinois Attorney Registration and Disciplinary Commission has since suggested to Petitioner's attorney that up to 120 cases may be similarly tainted.)

Accordingly, on October 15, 1987, at approximately 1:18 p.m. Petitioners filed a class action lawsuit on behalf of themselves and all other similarly situated in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, (No. 87 CH 10028) against Respondents Citibank, Wilk & Waller, Accurate Process Service, Randy Kadet, Scott Marks and Marilyn Kadet. Petitioner's sought compensatory and punitive damages under 42 U.S.C. §1983 for conspiracy to violate and violation of their due process rights. Co-incident to their prayer under 42 U.S.C. §1983, Petitioners sought a declaration that the judgments entered in the underlying municipal action were void.

(Petitioners Mark and Donna Contreras excluded themselves from this relief insofar as an agreed order was entered in their case declaring the judgment void.) Petitioners also sought a declaratory relief under state law declaring the judgments void for lack of jurisdiction and sought relief under a number of state causes of action.

FINDINGS BY THE CHANCERY COURT

The Chancery court first dismissed the class action complaint, *sua sponte*, with leave to file an amended complaint, holding it was without jurisdiction to declare the judgments of the municipal court void for lack of jurisdiction. *See* Appendix at 18-19. In ruling on the Petitioner's motion to reconsider the dismissal *sua sponte* the trial court again held it was without jurisdiction to declare void the judgment of another court of collateral jurisdiction and that petitioners only avenue of relief respecting the void default judgments was before the various municipal courts rendering the default judgments. *See* Appendix at 20-21. In ruling on Respondent's motion to dismiss the first amended complaint, the trial court held the relief sought (in the §1983 counts among others) of return of the sums wrongfully garnished was tantamount to a determination that the default judgments in the municipal division were void and that it was powerless to grant such relief. *See* Appendix at 22-23.

The Chancery court dismissed petitioner's §1983 claims as it was "persuaded by the more recent trend of the supreme court . . . , that the 'public function' conduct of a private party must be narrowly construed in finding state action." The Chancery court ignored a long line of cases cited by Petitioner which held private process servers are state actors (*see* pp. 23-25, *infra*) and found there was

no state action insofar as the process servers were private parties wrongfully using a statute for their own purposes. *See* Appendix at 22-23.

DECISION OF THE APPELLATE COURT

The Appellate Court of Illinois, First Judicial District agreed with the assessment of the Chancery court and held Petitioners were engaged in "forum shopping." Appendix at 9. This conclusion was based on Mark & Donna's having filed the class action complaint in the chancery division shortly before returning to the municipal court and "settling" the matter. The Appellate Court surmised Mark and Donna sought to avoid litigating the issue in the municipal division insofar as they were without a meritorious defense. Appendix at 8. In addition, the appellate court considered that Robert paid his judgment, secured a release and sought to undo the settlement. Appendix at 8. The appellate court also observed Robert did not allege a meritorious defense. Appendix at 8. The appellate court agreed the trial judge in the Chancery Division was powerless to declare void the judgments of the municipal courts. As to question of whether a court-appointed private process server "acts under color of state law" for purposes of 42 U.S.C. §1983, the appellate court held: "In view of our holding, it is unnecessary to address plaintiffs' arguments that various counts of the complaint were not subject to dismissal under section 2-615." *Contreras et al. v. Citibank (South Dakota) etc., et al.*, 198 Ill. App. 3d 1059, 1066, 556 N.E.2d 751, 754, 145 Ill. Dec. 133, 136 (1st Dist. 1990). *See* Appendix at 1-10.

REASONS FOR GRANTING THE WRIT

GENERAL OBSERVATIONS

From the outset, the principal problem with this litigation has been Petitioner's unfortunate choice to seek enforcement of their federal rights in a state court. The Illinois courts have myopically applied state decisional law without regard to their obligation to enforce federal rights or to the underlying purposes of §1983. No doubt Petitioners would not now find themselves before this august tribunal had this litigation been brought in the federal courts. Indeed, the rulings of the Illinois courts have repeatedly placed conditions upon Petitioner's vindication of their federal rights in no way contemplated by the Congress or this Honorable Court. *See Felder v. Casey*, 487 U.S. 131 (1988) (state statute conditioning vindication of federal rights held inapplicable to §1983 action brought in state court).

PETITIONERS WERE NOT REQUIRED TO EXHAUST STATE JUDICIAL REMEDIES

The courts below held Petitioners only avenue of relief respecting the void judgments was before the municipal court's rendering those judgments. This suggests Petitioners must first exhaust all state remedies before bringing an action under §1983, if at all. This Honorable Court has never required a plaintiff in a §1983 action to exhaust his state judicial remedies. *See e.g. Ellis v. Dyson*, 421 U.S. 426, 432-433 (1975); *Steffel v. Thompson*, 415 U.S. 452, 472-473 (1974); and *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Indeed, as noted in *Felder*, Congress choose to provide persons aggrieved by a deprivation of their

civil rights *immediate* access to the federal courts, subject to the concurrent jurisdiction in the state courts. *Felder*, 487 U.S. at 147. Petitioners cannot be denied immediate vindication of their federal rights under §1983 simply because they elected to bring their lawsuit in a state court. Accordingly, the state court cannot limit Petitioner's to proceeding before the courts rendering the void judgments.

Parenthetically, Petitioners would add limiting relief only to the court rendering the void judgment is inconsistent with Illinois law as well. *See e.g.* Ill. Rev. Stat. ch. 110 §2-1401(f) ("Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.") *See also State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 497 N.E.2d 1156, 100 Ill. Dec. 794 (1986) (a void judgment may be attacked and vacated at any time, in any court.)

PETITIONERS DID NOT HAVE TO ESTABLISH A MERITORIOUS DEFENSE IN THE MUNICIPAL ACTIONS, THUS UNDERCUTTING THE SPECTER OF FORUM SHOPPING RAISED BY THE APPELLATE COURT

The appellate court labeled Petitioner's §1983 action as impermissible "forum shopping." The court inferred Petitioners were afraid to litigate their claims in the municipal courts because they could not establish a meritorious defense, and instead brought their §1983 action in search of a more favorable forum. This conclusion is based neither in law or in fact. Petitioners have throughout attacked the judgments rendered by the municipal courts as void for lack of service on the face of the record. As this court made crystalline in *Peralta v. Heights Medical Center*,

Inc., 485 U.S. 80, 84 (1988), a judgment entered without notice or service is constitutionally infirm and conditioning its vacatur upon establishment of a meritorious defense is untenable. Moreover, Petitioners were in possession of twenty-one certified copies of identically phony affidavits of service, i.e., same plaintiff, same attorneys, same process servers and all filed with the municipal court long before the time of purported service. So convincing was the proof of fraudulent service that Wilk & Waller gladly agreed to the entry of an agreed order declaring the judgment in Mark and Donna's case void, a fact that the appellate court ignored. The appellate court also ignored that Robert was without the benefit of counsel, never uncovered the fraud and unwittingly paid the void judgment. In short, Petitioners were not forum shopping, but instead merely sought to vindicate their federal civil rights and those of the class they represent.

THE COURTS BELOW ERRONEOUSLY GAVE THE UNDERLYING VOID JUDGMENTS COLLATERAL ESTOPPEL EFFECT IN THE §1983 ACTION

The refusal of the Illinois courts to countenance a collateral attack of the void judgments rendered by the municipal courts in this §1983 action gives those void judgments collateral estoppel effect. This is directly contrary to a long line of this Honorable Court's precedent and again, altogether ignores the purposes underlying §1983.

In *Allen v. McCurry*, 449 U.S. 90 (1980), this Honorable Court held the doctrine of collateral estoppel precluded a §1983 plaintiff from relitigating an issue actually litigated in a state court proceeding. Specifically, the court held a state court decision in a criminal proceeding adjudicating the constitutionality of an attendant search and seizure precluded the criminal defendant from subsequently bringing an action for damages arising from the same claimed

constitutional deprivation. Four years later, in *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), this Court held the doctrine of collateral estoppel precluded a §1983 plaintiff from litigating a claim that could have been litigated in a related state court proceeding. Specifically, this Court held a §1983 plaintiff could not maintain her action where she had previously litigated the facts giving rise to the claim in a state court action and did not include the §1983 claim. Both opinions were careful to note, however, that the doctrine of collateral estoppel (issue preclusion or claim preclusion, respectively) did not apply to §1983 plaintiffs who did not have a full and fair opportunity to litigate the issue in the earlier state proceeding. *See Allen*, 449 U.S. at 95 (". . . collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case); and *Migra*, 465 U.S. at 84 (". . . petitioner does not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court).

Consistent with this reasoning, this court unanimously decided in *Haring v. Prosise*, 462 U.S. 306 (1983), that a criminal defendant who pled guilty to a criminal charge was not foreclosed from subsequently bringing an action for damages under §1983 arising from a search and seizure attendant to the criminal prosecution. The doctrine of collateral estoppel did not prevent the §1983 action because ". . . the legality of the search . . . was not actually litigated in the criminal proceedings. . . . The criminal proceedings did not actually decide against [the §1983 Plaintiff] any issue on which he must prevail in order to establish his §1983 claim. . . . [N]one of the issues in the §1983 action could have been 'necessarily' determined in the criminal proceeding." *Id.* at 316.

Petitioners did not have a full and fair opportunity to litigate the basis of their §1983 claim in the underlying municipal actions nor could they procedurally. Under Illinois law, a person aggrieved by "sewer service" is limited to issuance of a rule to show cause against the process server. *See* Ill. Rev. Stat. ch. 110, §2-203(c) ("any person who knowingly sets forth in such certificate or affidavit any false statement, shall be liable in civil contempt.") Petitioners sought to vindicate their rights respecting not only the process servers, but the plaintiff in the underlying suits, the attorneys and the notary public. Under Illinois law, such relief could not be had in a counterclaim and had to be sought in a separate suit. *See Bio-Scientific Clinical Laboratory, Inc. v. Todd*, 149 Ill. App. 3d 845, 103 Ill. Dec. 171 (1st Dist. 1986) (counterclaim not permitted where it was directed against individuals not parties to the original action). Moreover, even if a counterclaim could have been filed in the municipal actions, the large number of potential plaintiffs mandated that this case be brought as a class action. Indeed, others similarly aggrieved could not have been joined to Mark and Donna's case or Robert's case. Local rules mandated a class action be brought in the Chancery Division. *See* General Order of the Circuit Court of Cook County 1.2, Section 2.1, II(a), "[t]he General Chancery Sections hears actions and proceedings, regardless of the amount of the claim, concerning class actions, . . . , [and] declaratory judgments, ...)

As previously noted, relief was sought against others not parties to the municipal actions. A determination of the validity of service in the underlying municipal actions would not necessarily assess the liability of the attorneys, the notary public or the plaintiff. Thus, there would have been no identity of parties. Moreover, the operative facts and legal principles to be applied differed between the

municipal action and an action under §1983. *See generally Montana v. United States*, 440 U.S. 147 (1979). On general principles of collateral estoppel, the underlying municipal judgments cannot be given preclusive effect in this cause.

Moreover, in creating §1983 Congress intended a federal remedy in three circumstances, among them ". . . where state procedural law was inadequate to allow *full* litigation of a constitutional claim,. . . ." *Allen*, 449 U.S. at 100-101, *citing*, *Monroe v. Pape*, 365 U.S. 167 (1961). (Emphasis supplied.) And it is for that reason that this Honorable Court has repeatedly recognized that ". . . additional exceptions to collateral estoppel may be warranted in §1983 actions in light of the 'understanding of §1983' that "the federal courts could step in where the state courts were unable or unwilling to protect federal rights." *Haring*, 462 U.S. at 313-314. The facts of this case are prime among those for which §1983 was created. State law did not provide the mechanism for plenary redress of Petitioner's constitutional rights. The consideration to be afforded a §1983 action should be of no less effect because Petitioners seek redress of their federal rights in a state court. Accordingly, the void judgments rendered by the municipal court should not be afforded collateral estoppel effect in special consideration of the remedial purposes of §1983.

Even if the Illinois courts are correct as a matter of state procedural law (a contention Petitioners dispute), policy considerations underlying the supremacy of the federal civil rights laws mandate that state procedural law give way. *See Robertson v. Wegmann*, 436 U.S. 584, 589 ftnt. 5 (1978) and *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) (in §1983 action, federal courts are free under §1988 to ignore state procedural law when such law is inconsistent with the Constitution and laws of the United States). *See also Howlett v. Rose*, 496 U.S. ____, 110 L.

Ed.2d 332 (1990) (Supremacy Clause mandates state courts cannot deny enforcement of a federal right and in enforcing the same, may apply their own procedural rules, unless those rules are pre-empted by federal law.)

AN ACTION UNDER §1983 CAN BE USED TO COLLATERALLY ATTACK A VOID JUDGMENT

The courts below held Petitioners improperly sought to collaterally attack the void judgments rendered in the municipal actions. To the contrary, this Honorable Court has implicitly recognized that a party can use §1983 to collaterally attack a patently void judgment. In *Schlesinger v. Councilman*, 420 U.S. 738 (1975), an army captain filed an action for declaratory relief collaterally attacking as void a pending court martial. In finding that an Article III court had jurisdiction to entertain the action, this Honorable Court recognized:

> . . . [c]ollateral attack seeks, as a necessary incident to relief otherwise within the court's power to grant, **a declaration that a judgment is void.** A judgment, however, is not rendered void merely by error, nor does the granting of collateral relief necessarily mean that the judgment is invalid for all purposes. On the contrary, it means only that for purposes of the matter at hand the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifies nor bars relief from its consequences.

Id. at 746-747 (Emphasis supplied). *See also Ellis v. Dyson*, 421 U.S. 426 (1975) (§1983 action used to collaterally attack criminal conviction.) ". . . Void judgments, although final for purposes of direct review, may be impeached collaterally in suits otherwise within a court's subject matter jurisdiction." *Schlesinger*, 420 U.S. at 749. This case is inapposite. From the outset, Petitioners have main-

tained the default judgments rendered by the municipal courts were void for lack of jurisdiction. As part of their prayer for relief, Petitioners sought a declaration that those judgments are void for lack of constitutionally mandated service of process, if not for all purposes, certainly for purposes of their §1983 action. Such a declaration would allow for compensatory damages, return of attorneys fees and court costs wrongfully taxed, and restoration of Petitioners' credit ratings which are indelibly marred by the judgment. *See United States v. Brand Jewelers*, 318 F.Supp. 1293 (S.D.N.Y. 1970) (government seeks among other things, a judgment declaring thousands of state default judgments void for lack of service in a suit under §1983). *See generally Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1985) (wrongful judgment is a lien on property, subjects party to garnishment and impacts on creditworthiness.) Such relief is certainly within the jurisdiction of the Chancery Division of the Circuit Court of Cook County. It is a court of general jurisdiction. *Lescher v. Barker*, 57 Ill. App. 3d 776, 15 Ill. Dec. 535 (1st Dist. 1978) (as divisions of the same constitutional court of general jurisdiction, each division of the circuit court has equal and concurrent subject matter jurisdiction.) Accordingly, the state court improperly dismissed plaintiff's §1983 action as an improper collateral attack.

A COURT APPOINTED PRIVATE PROCESS SERVER ACTS UNDER COLOR OF STATE LAW

The trial court held a court appointed private process server was not acting under color of law, but merely misusing a state statute. Appendix at 23. The court apparently misunderstood the impact of the cases to which it referred. Recall that the appellate court let this ruling stand without reviewing it. Appendix at 10. Private parties are liable under §1983 for misuse of state statutes when the misuse involves the power of the state in the deprivation of civil rights.

In *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982), this Honorable Court established a two part test by which to determine whether the action of a private party depriving the plaintiff of a constitutionally protected right may be fairly attributable to the state.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he has acted together with or has obtained significant aid from the state officials, or because his conduct is otherwise chargeable to the state.

Id. at 937. The Court was careful to note, "[a]lthough related, these two principles are not the same. They collapse into each other when the claim for constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions." *Id.* at 937. *See also Flagg Brothers Inc. v. Brooks*, 436 U.S. at 149, 157 ftnt. 5 (1978) (" 'The involvement of a state official . . . plainly provides the state action essential to show a direct violation of . . . [plaintiff's] Fourteenth Amendment . . . rights, whether or not action of the [official] were officially authorized, or lawful' "). The "state action" and "state actor" requirements diverge when the constitutional claim is directed against a party without the apparent authority of the state.

The court underscored the differences between the "state action" and "state actor" requirements by reference to past decisions. In *Moose Lodge, No. 107 v. Irvis*, 407 U.S. 163 (1972), this Court held the refusal of the Moose Lodge to serve dinner to Irvis, a black, based upon its bylaws which limited membership to white Caucasians was not actionable under section 1983 because its discriminatory policy could not be ascribed to a governmental

decision. That the state liquor control board licensed the Moose Lodge and authorized it to sell liquor did not provide the necessary "state action" since the regulation of the state was unconnected to the discriminatory policy.

The parameters of the "state actor" requirement were defined by review of *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). In that case,

> the Court, . . . , focused . . . on the character of the defendant to the section 1983 suit: Action by a private party pursuant to this statute, without something more, was not sufficient to justify a characterization of that party as a 'state actor.' The Court suggested that 'something more' which would convert the private party into a state actor might vary with the circumstances of the case. This was simply *a recognition* that the Court has articulated a number of different factors or tests in different contexts e.g. the 'public function' test, . . . ; the 'state compulsion' test, . . . ; the 'nexus' test, . . . ; and in the case of prejudgment attachments, a 'joint action test', ... Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here.

Lugar, 457 U.S. at 939 (Emphasis supplied). Thus, in *Lugar* the debtor was allowed to challenge the constitutionality of Edmondson's prejudgment attachment of his property because of the integral involvement of judicial and executive officers of the state. Conversely, in *Flagg Brothers*, the debtor was not allowed to challenge a warehouseman's decision to employ the state statutory system because it was not encouraged by the state and because the system did not require the aid of officers of the state. In short, the difference between *Lugar* and *Flagg Brothers* turned upon the involvement of state officers in aiding the private party in

the deprivation. *See Tulsa Professional Collections Services v. Pope*, 485 U.S. 478 (1988) (". . . when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found.")

The Official Character Of Court Appointed Process Servers Lends The Weight Of The State To Their Actions

Petitioners submit that this case presents one of those situations noted by the *Lugar* court where the "state action" and "state actor" requirements collapse into one another. The official character of Kadet, Marks, and Accurate is such as to lend the weight of the state to their actions.

In Illinois, "[t]he judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." *Ill. Const. Art.* 6, Section 1 (1970). "Process" is the means used by the court to acquire or exercise jurisdiction over a person or over specific property. *Holiday Magic, Inc. v. Scott*, 4 Ill. App. 3d 962, 282 N.E.2d 452 (1st Dist. 1972). The court always has control of its own process. 30 Ill. Law & Prac., *Process*, Section 2 (1988). Indeed, Section 2-202 of the Illinois Code of Civil Procedure provides: "Process **shall** be served by a sheriff . . . . The **court may,** in its discretion upon motion, order service to be made by a private person over 18 years of age and not a party to the action." Ill. Rev. Stat. ch. 110, §2-202 (1988) (Emphasis supplied).

Under the Fourteenth Amendment, prior to an action which will affect an interest in life, liberty or property, ". . . a State must provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an oppor-

tunity to present their objections.' ". *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795 (1982), *quoting*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Thus, the proper service of process is clearly a function of the state.

The requirements of §2-202 foster the state interest in the efficient administration of justice and the constitutional mandate of the Fourteenth Amendment. Section 2-202 insures that the watchful eye of the state monitors the operation of its legal machinery. Kadet, Marks, and Accurate were duly-appointed officers of the court and acted as arms of the State of Illinois. Where they purposefully denied the class members of notice of the pendency of the collection lawsuits, it was as if the State of Illinois had done so. The deprivation of the class members' due process rights was done under color of law and is properly redressed under §1983.

The instant case is likened to *West v. Atkins*, 487 U.S. 42 (1988). In that case, plaintiff sued the state prison system for deprivation of his Eighth Amendment rights after a private physician under contract to the state prison system mistreated his injuries. Lower courts had dismissed the complaint, finding the actions of a private physician were not state action inasmuch as a physician exercised independent professional judgment. This Honorable Court reversed, finding: '[i]t is the physician's function with the state system, not his terms of employment, that determine whether his actions can be attributed to the State. . . . Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive State prisoners of the means to vindicate their Eighth Amendment rights." *Id.* at 55-56. So too in this case. Appointing a special process server does

not relieve the State of Illinois of its obligation to insure proper service of process nor does it deprive the class members of their means to vindicate that right under section 1983. *See also Del's Big Saver Foods, Inc. v. Carpenter's Cook, Inc.*, 795 F.2d 1344 (7th Cir. 1986) (state cannot avoid its obligation under the due process clause by delegating to private parties the authority to deprive people of their property without due process of law).

This Honorable Court remains especially sensitive to deprivations of due process rights by a state via its courts. In *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), the Court held unconstitutional a state statute barring probate claims not filed with the estate's representative within two months of issuance of letters of office because it did not require that notice be sent to known claimants. The estate urged the constitutionality of the statute, arguing it was a self-executing statute of limitations involving no state action. The Court disagreed, finding: "The probate court is intimately involved throughout and without that involvement the time bar is never activated. The nonclaim statute become operative only after probate proceedings have been commenced in a state court. The court must appoint the executor . . . [and] direct the executor to publish notice. . . Finally, copies of the notice and an affidavit of publication must be filed with the court. It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment." *Id.* at 487.

Given Illinois' statutory scheme for the appointment of special process servers, the Constitutionally imposed notice requirements on the State and this Honorable

Court's continued vigilance in safeguarding a litigant's right to notice of court proceedings, it is clear the actions of Kadet, Marks and Accurate were done under the color of state law.

The Actions Of Court Appointed Process Servers Are Fairly Attributable To The State Under The *Lugar* Analysis

Assuming for purposes of argument, this Honorable Court does not find the official character of Kadet, Marks and Accurate lends the weight of the State of Illinois to their actions, Petitioners submit that their actions may be fairly attributable to the state under the two-part test enunciated in *Lugar*.

In *Lugar* "state action" was found where the deprivation of a constitutional right was caused ". . . by a person for whom the state is responsible." *Id.* at 939. If the analysis in the foregoing section does little else, it clearly establishes the State of Illinois is responsible for the actions of those whom it appoints special process servers. Section 2-202 of the Illinois Code of Civil Procedure insures that only those meeting statutory requirements and approved and *appointed* by the court serve process in the stead of the sheriff. Accordingly, duly appointed special process servers are officers of the court and act as an arm of the state.

As defined in *Lugar*, a "state actor" is one who ". . . acts together with or has obtained significant aid from the state. . ." or whose conduct ". . . is otherwise chargeable to the state." *Id.* at 939. Restated, "state action" is private action with "something more." *Id.* The "something more" is found by resort to other tests previously established by the Court, such as (for these purposes) the "public function test" or the "joint action test." *Id.*

The Chancery judge in this case found the cases cited by Petitioners on state action on point, but found them tacitly overruled by *Lugar*. To the contrary, *Lugar* simply recast those cases as part of an analytical working tool with which to guide the fact oriented inquiry necessitated when private parties are charged with deprivation of constitutional rights under section 1983. (" 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance' ". *Lugar*, 457 U.S. at 939.) Thus, those cases cited by the Petitioners were not supplanted by *Lugar*, but rather are to be used within the context of the two part test enunciated by *Lugar*.

The cases cited by Petitioners to which the Chancery Court referred all held that private process servers who filed false affidavits of service were liable under the civil rights laws insofar as they performed "public functions." Those that conspired with them were likewise liable insofar as they "participated jointly" with them in a scheme to deprive others of their due process rights.

In *United States v. Wiseman*, 445 F.2d 792 (2nd Cir. 1971), defendants, professional private process servers, had been convicted under 18 U.S.C. §242 (the criminal counterpart of §1983) of routinely depriving inhabitants of the United States of their constitutional right to due process of law by signing blank affidavits of service which their employer would subsequently complete and file with the clerk of the court. Default judgments would then be taken against the persons named as defendants in the suits to which the affidavits of service related. Wage garnishments were initiated in a number of cases. On appeal, the defendants assailed their convictions arguing that their conduct, as private individuals, did not amount to state action. The Second Circuit found that defendants had engaged in state

action insofar as they performed a "public function" reserved to the state.

> Unlike most functions involved in the conduct of a lawsuit by private parties, the service of summons is essentially and traditionally a public function. . . . That the defendants sought to take advantage of their authority to perform this 'act of public power' by signing blank affidavits of service without actually effecting service does not remove their activities from the 'public' classification. Indeed, the signing of an 'affidavit of service' is as much a part of the exercising of the right to effect service of summons as is the act of service itself. Similarly, that defendants signed 'affidavits' in blank, rather than waiting until they were filled in and then swearing to the accuracy of the information contained therein as required by State law does not remove or lessen the 'public' nature of the act.

Id. at 796. *See also United States v. Barr*, 295 F.Supp. 889 (S.D.N.Y. 1969) (private process servers engaged in a public function in lieu of the sheriff and triggered the judicial machinery of the state by filing false affidavits of service); *United States v. Brand Jewelers*, 318 F.Supp. 1293 (S.D.N.Y. 1970) (private process servers engaged in "state action" in filing false affidavits of service); *Judo, Inc. v. Peet*, 326 N.Y.S.2d 441 (1971) (private process server filing false affidavit of service acts under color of state law); *Carrasco v. Klein*, 381 F.Supp. 782 (E.D.N.Y. 1974) (private process server, executing a false affidavit of service of summons on a defendant in a civil proceeding, may well be directly responsible for the absence of notice; such 'sewer service' is a denial of due process by one engaged in 'essentially and traditionally a public function.) The analysis in these New York cases is readily applicable to the instant case inasmuch as the Illinois

statute respecting service of process is identical to New York's. *See Scarver v. Allen*, 457 F.2d 308, 309 (7th Cir. 1972) (section 1983 action against process server for "sewer service" arising in Cook County).

The State of Illinois through the Circuit Court of Cook County, is responsible for its duly appointed process servers, Kadet, Marks and Accurate, thus satisfying the "state action" prong of the *Lugar* test. These private process servers engaged in a public function and set in motion the judicial machinery of the State of Illinois. Because of their unique position, occupied solely by the grace of the State of Illinois, these private process servers summarily denied the class members of their constitutional right to due process of law and stripped them of their property. This conduct, authorized or not, is chargeable to the State of Illinois and makes these private process servers "state actors" for purposes of the *Lugar* test. Under *Lugar* the co-existence of "state action" and a "state actor" make clear that the conduct of Kadet, Marks and Accurate are fairly attributable to the State of Illinois and that their actions were done under color of law for purposes of §1983.

The actions of Marilyn Kadet (notary public) and Wilk & Waller (attorneys) are likewise actionable under §1983. Both knowingly participated with the process servers in the deprivation of the class members' constitutional rights and are equally liable under §1983 as co-conspirators. *See Dennis v. Sparks*, 449 U.S. 24 (1980) (lawyers conspiring with judge to deprive plaintiff of due process in court proceedings liable under §1983); and *Mabe v. City of Galvaston Park etc.*, 635 F.Supp. 105, 108 (S.D. Tex. 1986) (within the context of individual dispute resolution, a private party acts under color of law when he or she corrupts judicial power.)

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Honorable Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

[198 Ill. App. 3d 1059]

MARK J. CONTRERAS, *et al.*,
Plaintiffs-Appellants,
v.
CITIBANK (South Dakota) *et al.*,
Defendants-Appellees.

First District (6th Division) No. 1-88-3088

Judgment affirmed.

Opinion filed May 18, 1990

* * * * *

Appeal from the Circuit Court of Cook County; the Hon. Albert Green, Judge, presiding.

Onesto, Giglio, Meltreger & Associates, of Chicago, for appellants.

O'Connor & Schiff, of Chicago, and Donald S. Rothschild, of Oak Park, for appellees.

JUSTICE McNAMARA delivered the opinion of the court:

Plaintiffs Mark J. Contreras, Donna A. Contreras and Robert Schmidt brought a class action against defendants Citibank (South Dakota), Wilk & Waller, Randy Kadet, Scott Marks, Marilyn Kadet and Accurate Process Service, alleging fraudulent conduct relating to the collection, in separate proceedings, of delinquent credit card accounts. The trial court dismissed the complaint on the basis that it had no jurisdiction to declare the collection judgments void in this proceeding. Plaintiffs contend on appeal that the trial court had jurisdiction to declare the judgments void; that the court-appointed process servers acted under color of law; that plaintiffs sufficiently pled conspiracy;

that they sufficiently pled fraud and a violation of the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1987, ch. 121½, par. 261 *et seq.*); that there is a private right of action under the false affidavit of service statute and the wrongful wage deduction statute; and that they sufficiently pled negligent hiring.

The complaint alleges that the Contrerases held accounts with Citibank, and incurred debts to Citibank, which initiated collection actions on April 21, 1987, in the municipal division under the case name Citibank v. Contreras. The complaint further alleges that on May 27, 1987, the sheriff of Cook County returned the summons with an affidavit stating he was unable to serve the Contrerases.

On June 29, 1987, Wilk & Waller, a private process server acting on behalf of Citibank, had the clerk of the court issue an alias summons with a return date of August 11, 1987. It also set for hearing on July 13, 1987, an *ex parte* motion for appointment of Randy Kadet as special process server. Subsequently, Kadet prepared a false affidavit of service indicating he made substitute service on a Ms. Contreras, a female Hispanic, approximately 30 years of age, at 2300 North Mango, Chicago, on July 13, 1987, at 7:27 p.m. Marilyn Kadet notarized the affidavit, dated July 13, 1987. Randy Kadet returned the affidavit and alias summons to Wilk & Waller. On July 2, 1987, Wilk & Waller filed the papers, which showed the false service date of July 13, 1987, with the clerk of the court.

On July 13, 1987, the court appointed Randy Kadet as special process server. On August 11, 1987, a default was entered against the Contrerases. On August 25, 1987, judgment was entered against them on the default in the amount of $1,350.95 plus costs. On September 1, 1987, Wilk & Waller filed an affidavit for a wage deduction

order, and the clerk of the court issued a wage deduction summons to Mark Contreras' employer, the United States Post Office. On October 30, 1987, the employer withheld his wages.

In regard to Robert Schmidt, Wilk & Waller filed an action against him on behalf of Citibank on January 13, 1987, for collection of the balance outstanding on a VISA account. On February 23, 1987, the sheriff of Cook County returned the summons with an affidavit stating he could not serve it. On March 25, 1987, Wilk & Waller had the clerk of the court issue an alias summons with a return date of May 5, 1987. On April 3, 1987, Wilk & Waller set for hearing on April 10, 1987, an *ex parte* motion for appointment of Randy Kadet as special process server.

Subsequently, Kadet prepared a false affidavit of service indicating he made substitute service on a Mr. Schmidt, a white male, approximately 35 years of age, at 4304 North Francisco, Chicago, on April 10, 1987, at 6:05 p.m. Marilyn Kadet notarized the affidavit and dated it April 10, 1987.

At 11:20 a.m. on April 10, 1987, Wilk & Waller filed the alias summons and false affidavit of service with the clerk of the court. At 1:45 p.m. that day, Wilk & Waller had the court appoint Kadet as special process server.

On May 5, 1987, a default was entered against Schmidt. On May 19, 1987, judgment was entered on the default in the amount of $1,711.40 plus costs. On May 27, 1987, Wilk & Waller filed an affidavit for wage deduction order. The court issued a wage deduction summons to Schmidt's employer, the Chicago Park District, returnable on August 26, 1987.

The record includes a July 10, 1987, release of judgment filed by Wilk & Waller for Citibank, stating it had "re-

ceived full satisfaction and payment" from Schmidt. On August 18, 1987, a stipulation to dismiss the garnishment was filed. On August 26, 1987, conditional judgment was entered against the Chicago Park District in the amount of $1,821.76. Schmidt does not allege in either complaint that his wages were ever in fact garnished.

Plaintiffs' motion for leave to take discovery on the class stated that in reviewing 300 of the 1,500 collection cases filed in Cook County in 1987 by Wilk & Waller on behalf of Citibank, they discovered 34 cases in which the affidavit of service was filed on a date and time well in advance of the date and time of purported service.

In Citibank v. Contreras, on September 24, 1987, pursuant to section 2-1301(e) of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 2-1301(e)), the Contreras filed a motion to vacate the judgment entered against them on August 25, 1987. A hearing on the motion to vacate was set for October 1, 1987, and was continued to October 15. The Contrerases also filed a special and limited appearance, a motion to quash service of summons, and a petition for a rule to show cause on the private process server under section 2-203 of the Code of Civil Procedure.

On October 13, 1987, the Contrerases moved for leave to withdraw the petition for a rule to show cause and filed an amended motion to quash. On October 15, 1987, at 1:18 p.m., they filed the present suit in the chancery division.

On the same day, at 2 p.m., the Contrerases appeared in the municipal division regarding Citibank v. Contreras and offered to pay Citibank the outstanding balance in full, as settlement and release of the Citibank v. Contreras action. Citibank accepted payment on the same day. The Contrerases then tendered a typewritten agreed order dis-

missing Citibank v. Contreras and withdrew all previously filed motions in that case.

Defendants in the present suit filed a motion to strike and dismiss all counts of the complaint. On December 2, 1987, Wilk & Waller filed a motion to disqualify plaintiffs' attorney and a motion to dismiss based on the argument that on October 1, 1987, the Contrerases submitted to the jurisdiction of the municipal division in Citibank v. Contreras, and later settled the suit, and were therefore disqualified as representatives of the class.

On January 27, 1988, an order was entered stating that the "court *sua sponte* dismissed plaintiffs' complaint." The court found it had no jurisdiction to vacate the judgments in the underlying actions and declare them void. The court stated:

> "While certain issue[s] are asserted which relate to jurisdiction, they relate to jurisdiction by means of perpetuating the fraud. Moreover, this is not a Court of Appeals, and neither party has addressed the propriety of a collateral attack on the judgments obtained in the Municipal Court. This Court concludes, therefore, that the plaintiff is not barred from asserting the facts presented as they related to the scheme of fraud, but the plaintiffs cannot ask this court to vacate the judgments in the Municipal Court or declare them void. The remedy, therefore, is dismissal pursuant to the Illinois Code of Civil Procedure, section 2-615, with leave to amend. This Court will dismiss the complaint *sua sponte* pursuant to 2-615."

On March 29, 1988, the court denied plaintiff's motion for reconsideration, finding that a section 2-1401 petition for relief from judgment should have been filed in the same proceeding in which the order of judgment was entered. The court stated: "In dismissing this matter previously, this court made clear that it's not to be substituted as a court of review. That is not its proper role."

In this class action, count I of the original complaint sought a declaratory judgment pursuant to section 2-701 (Ill. Rev. Stat. 1987, ch. 110, par. 2-701), declaring the default judgments void. Count II alleged conspiracy to violate civil rights by summarily denying due process of law and notice of the collection suits, in violation of 42 U.S.C. section 1983 (1986). Count III alleged a violation of the class members' civil rights. Count IV alleged common law fraud. Count V alleged a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. Count VI alleged an implied cause of action under section 2-203 (Ill. Rev. Stat. 1987, ch. 110, par. 2-203(c)). Count VII alleged a private cause of action under section 12-817 (Ill. Rev. Stat. 1987, ch. 110, par. 12-817). Count VIII alleged negligent hiring and failure to supervise. All counts sought a return of all moneys obtained as a result of the void judgments, plus compensatory and punitive damages.

On April 12, 1988, plaintiffs filed an amended complaint excluding count I, which sought a declaration in chancery that multiple municipal judgments were void. Each defendant filed a motion to strike and dismiss the first amended complaint.

On July 26, 1988, the first amended complaint was dismissed with leave to amend. The court addressed each count in the amended complaint. As to counts I and II, the court found plaintiffs failed to sufficiently allege State action. Counts III and IV alleging fraud were deficient because they failed to sufficiently allege defendants' intent that plaintiffs rely on their misrepresentations, and failed to plead damages. Count V was dismissed because there was no separate cause of action under section 2-603. Count VI was dismissed because section 12-208 could not be used where plaintiffs admitted their indebtedness to Citibank. Count VII alleging negligent hiring and super-

vision contained only conclusory statements and insufficient facts. The court then stated its alternative reason for dismissing the complaint:

> "Although plaintiffs argue otherwise, this court has determined that by way of the nature of the relief prayed for, returning sums obtained through the 'void' judgments, plaintiff continues to ask this court for relief which it is not empowered to grant. That is a determination that the default judgments rendered in the municipal division are void. This is akin to vacating the judgments. * * * Once more, * * * I am going to grant you the right to file a second amended complaint to see if you can meet muster. This case, if you can meet muster, should be transferred to the court of original jurisdiction wherein the judgments were entered."

On December 1, 1988, plaintiffs chose to stand on the amended complaint, and the court allowed the election to stand as to count I of the original complaint and as to all counts in the first amended complaint.

Plaintiffs contend that the chancery division of the trial court erred in concluding it had no power to vacate or declare void a judgment of the municipal division. Plaintiffs maintain the judgments in the underlying actions are void and that void judgments are subject to collateral attack at any time, in any court. Plaintiffs argue that the judgments are void because there was no personal jurisdiction, since they were never actually served, and because the judgments were procured through fraud.

Everything in this action is based on the judgments entered in the underlying suits. Plaintiffs seek to have those judgments declared void. Each count in their complaint asks for relief involving those judgments. The complaint seeks to compel Citibank and Wilk & Waller to return any money obtained as a result of "said void judg-

ments," and award the class $2,500,000 in compensatory damages and $5 million in punitive damages. The trial court properly explained that "plaintiffs paid the judgment voluntarily [in one court] yet seek to recoup the funds paid by having the judgment declared void" in another court. The record shows that the Contrerases paid the debt to defendant in full. The July 10, 1987, release of judgment for Schmidt's debt states that "full satisfaction and payment" was made to defendant. The trial court noted at the January 27, 1988, hearing on the motion to dismiss the complaint that as to Schmidt, "[j]ust like in the Contreras situation, a default judgment and wage garnishment followed, although the garnishment was dismissed on August 18, 1987." At the July 26, 1988, hearing on the motion to dismiss the first amended complaint, the court stated that the "named plaintiffs have excluded themselves from the return of any monies by Citibank and Wilk and Waller because they negotiated a settlement of Citibank's claim against them."

The simple answer is that plaintiffs should have made that attack in the underlying suits instead of bringing this separate action. Instead, the municipal division heard the Contrerases' (defendants in that case) motion to vacate the default judgment. The court repeatedly asked plaintiffs' counsel if there was a meritorious defense. Counsel refused to answer the question, insisting that the only question was whether the service of process affidavits were false. The court continued the case to permit plaintiffs to offer some proof that the affidavits were false. Instead, the Contrerases voluntarily paid the judgment. Schmidt's judgment was also paid, and he has alleged no meritorious defense.

Relief from a judgment entered in the trial court may be obtained under either section 2-1301(e) of the Code of

Civil Procedure (within 30 days of entry of judgment), or under section 2-1401 of the Code of Civil Procedure (after 30 days but before two years have passed). (Ill. Rev. Stat. 1987, ch. 110, pars. 2-1301(e), 2-1401.) Moreover, where a party seeks to contest personal jurisdiction, he must enter a special and limited appearance under section 2-301 of the Code of Civil Procedure. (Ill. Rev. Stat. 1987, ch. 110, par. 2-301.) This special appearance may be made after a judgment has been entered, thereby rendering the judgment void. *LaMotte v. Constantine* (1980), 92 Ill. App. 3d 216, 416 N.E.2d 23; *Washington v. Clayter* (1980), 91 Ill. App. 3d 489, 414 N.E.2d 1085.

Here, plaintiffs appeared in the underlying actions, and entered into settlement agreements, and the court released them from the default judgments. On October 15, 1987, the Contrerases filed the present suit attacking and seeking relief from the underlying judgment. Less than an hour later, in the municipal division they opted to abandon their motion to vacate under section 2-1301, and entered an agreed order of settlement. In effect, the three named plaintiffs asked the chancery division to review the municipal division's action. We find no law permitting such a review.

Plaintiffs are not seeking to enforce the judgments in the underlying suits. Instead, they are seeking to sidestep the municipal division's decisions in regard to the default judgments by going over to chancery as an alternate forum. Plaintiffs' attempt to rely on collateral attack here is merely forum shopping, which is not permitted under the law. Ill. Rev. Stat. 1987, ch. 110, par. 2-1002; *Balciunas v. Duff* (1983), 94 Ill. 2d 176, 446 N.E.2d 242.

Thus, we agree with the trial court's interpretation of the scope of collateral attack. Plaintiffs may not use collateral attack to circumvent the requirements of sections

2-1301, 2-1401 and 2-301 of the Code of Civil Procedure. The chancery division was without power to vacate the municipal division's judgments.

In view of our holding, it is unnecessary to address plaintiffs' argument that the various counts of the complaint were not subject to dismissal under section 2-615.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

EGAN and RAKOWSKI,* JJ., concur.

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* Justice William Quinlan participated in the above entitled cause prior to his resignation. Justice Thomas Rakowski was designed the third member of the panel and has read the briefs and listened to the tapes of oral argument.

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
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October 3, 1990

Mr. Peter A. Regulski
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No. 70405—Mark J. Contreras, et al., petitioners, v. Citibank (South Dakota), etc., et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 25, 1990.

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

CITIBANK (SOUTH DAKOTA),	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 87 M1 130654
	)	
CONTRERAS,	)	
	)	
Defendants.	)	

REPORT OF THE PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable WILLIAM D. KELLY, one of the Downstate Judges, on the 1st day of October, A.D., 1987.

PRESENT:

MR. MICHAEL POLK,
Appeared on behalf of the Plaintiff,

MR. PETER REGULSKI,
Appeared on behalf of the Defendant.

THE CLERK: Citibank v. Contreras.

MR. REGULSKI: Good afternoon, your Honor.

My name is Peter Regulski, R-e-g-u-l-s-k-i, on behalf of Mark and Donna Contreras.

MR. POLK: Michael Polk on behalf of Citibank South Dakota, responding.

MR. REGULSKI: This is Defendant's motion to vacate default judgment entered August 25, 1987. If Your Honor will take a look at the summons and the affidavit filed

in return thereof, the Court will see there is a discrepancy as to the date. Accordingly, we will contend there was no service on these particular Defendants, and we will be asking that the default be vacated.

I am tendering to the Court a certified copy of summons and the return. If the Court will notice, it indicates it was filed On July 2nd at 9:56, and the affidavit supports thereof, service was July 13th, a discrepancy of better than 11 days.

I would submit, your Honor, therefore, that no service was had, and the default judgment should be vacated.

MR. POLK: Judge, in response, first of all, Judge, the summons was not issued until June 29th. It seems unlikely that it would be return service three days later. In addition, the half sheet, which is the official court record, reflects that alias summons was returned served on August 6th. I suggest to your Honor, on the change of the month, end of July, beginning of August, someone failed to time clock August 6th on the court file. In addition, there is no affidavit in the motion that would indicate there was no service, and I would advise the Court that between the date of service and the date judgment was taken, the Defendant made certain payments to Citibank. The amount of judgment was reduced to reflect those payments.

I suggest there was service, and Mr. Contreras is responding to the wage deduction that is ongoing to the U.S. Post Office.

MR. REGULSKI: I don't think there was a mistake in the clerk's office. The Court can take judicial notice that August 2nd is a Sunday. As we know, the clerk's office is not opened for business on Sundays.

MR. POLK: The official record of the Court, which is the half sheet, is that the summons was returned August 6th.

MR. REGULSKI: I submit to the Court the computer printout showing the activities in this case, and it indicates that the summons was returned on August 6th. So I again submit, there are some very serious questions on the date. All these things were done, and I ask this Court to vacate the default that was entered on the 25th of August.

THE COURT: Your motion says you have a good and meritorious defense to this. Is that correct?

MR. POLK: Counsel represented to me in the hallway what he is trying to do is avoid a judgment on the client's record. There is no defense.

THE COURT: Wait a minute. On your pleading, you said a good and meritorious defense. Counsel says that is not the case, which is it? It is one or the other. It is not both.

MR. REGULSKI: That may very well be true. The point of the matter is, Judge, there is a very serious question as to what is going on with these dates, and I think if we are going to be filing lawsuits, we have to follow the rules of procedure and the rules of Court.

THE COURT: I am all for that.

MR. REGULSKI: The rules of Court says you have to have personal service on a person before a default judgment can be entered. According to the record on the court file, I don't see we can say service was had on Mr. and Mrs. Contreras. There is no basis to enter default judgment, and I ask that the default judgment be vacated.

THE COURT: Get to the point, Counsel. Do you have a good and meritorious defense? Let's hear it.

MR. REGULSKI: Your Honor, I don't think we need to get into that.

THE COURT: I think we do. Let's hear it. You said in your motion that you have one. What is it?

MR. REGULSKI: Payment has been tendered.

MR. POLK: Not payment in full. The judgment was amended accordingly. We sued him for $1,450. The judgment was entered for an amount less than that. I submit to the Court, regardless of what the time stamped is, the official record, the half sheet, says it was served August 6th.

MR. REGULSKI: I submit to the Court 2-2036 [2-203(c)] of the Illinois Code of Civil Procedure that says, "Anytime a false affidavit has been submitted, that is contemptible conduct."

THE COURT: Can you prove it is false?

MR. REGULSKI: I think I will be able to, yes, sir.

THE COURT: Now?

MR. REGULSKI: Pardon me?

THE COURT: Can you prove it now?

MR. POLK: There is nothing in the record that indicates that it is false, Judge. It is an affidavit the special process server served.

MR. REGULSKI: Your Honor, I would be willing to concede that in certain cases, people make mistakes, but I would also submit that those mistakes happen infrequently.

I have here 21 certified copies of summons and returns and affidavits in support that are identical to that one; inasmuch as, they are filed on one day and served—and

service indicates that it was had on some other day, several days down the road.

I would submit this constitutes a pattern of abuse. Accordingly, I would submit that the same thing happened in this case. That affidavit has absolutely nothing to do with service on Mr. and Mrs. Contreras. It was made up, and it was filed.

I would submit to the Court, I have 20 certified copies of affidavits and returns of service that show the same type of abuse.

THE COURT: You have something from the Defendants saying they were not served on that date?

MR. REGULSKI: We were not served at all.

MR. POLK: There is no affidavit to that effect.

THE COURT: Was your affidavit in affect?

MR. REGULSKI: It appears on the face of the record.

If you want to continue this matter, I will bring Mr. and Mrs. Contreras in, and we will have them testify here.

MR. POLK: Judge, I would also point out, there is a discrepancy of Counsel's computer record, and what he states the time stamp is, the computer records shows it was July 6th. The file says July 2nd, and the official record docket shows August 6th. I suggest there is error in the clerk's office. There is no false affidavit.

MR. REGULSKI: I submit there—it can be filed on July 2nd, and several days later, they will input it in the computer what was done on a given day. That is probably unexplainable discrepancy. I have a difficult problem between July 2nd and July 13th.

THE COURT: I will enter and continue your motion for two weeks to the 15th at 2:00 p.m., to give you an opportunity to present evidence to show this return is not proper.

MR. REGULSKI: At the same time, I will be asking leave to file a special and limited appearance. A copy of which is being tendered to the Court and a copy to Counsel.

I will be submitting for the hearing, a motion to quash service of summons, and we will recall the wage deduction order, and I will be filing a petition to show cause against the process server, all for hearing the same day.

THE COURT: The record will show they have been filed.

MR. POLK: I would appreciate if Counsel would service me with copies of those.

MR. REGULSKI: You have your notice.

MR. POLK: I don't have copies of the pleadings.

MR. REGULSKI: I will have them stamped, and I will tender them in court.

Thank you for your consideration, your Honor.

MR. POLK: Judge, can I get a written response—affidavit prior to that time?

THE COURT: It is up to him, if he comes up with one.

MR. REGULSKI: Thank you for your consideration, your Honor.

(Proceedings concluded.)

[Certificate of Court Reporter omitted in printing.]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MARK CONTRERAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 87 CH 10028
	)	
CITIBANK etc., et al.,	)	
	)	
Defendants.	)	

REPORT OF THE PROCEEDINGS has at the hearing of the above-entitled cause before the Honorable ALBERT GREEN, Judge of said court, on the 27th day of January, 1988, at the hour of 10:30 a.m.

PRESENT:

MR. PETER A. REGULSKI appeared for the Plaintiffs;

MESSRS. SIDLEY & AUSTIN
BY: MR. JON I. FIELDMAN appeared for Citibank;

MESSRS. O'CONNOR & SCHIFF
BY: MS. LORETTA GRIFFIN appeared for Wilk & Waller;

DONALD S. ROTHSCHILD & ASSOCIATES
BY: MR. DONALD S. ROTHSCHILD and Mr. ELMER GERTZ appeared for Randy Kadet, Scott Mark, Marilyn Kadet and Accurate Process Service.

THE CLERK: Are all parties here on Contreras v. Citibank, 87 CH 10028

MR. FIELDMAN: Yes, Your Honor.

THE COURT: The matter comes up on a motion to strike and dismiss and a motion to disqualify.

(Thereafter followed brief remarks by counsel and a factual recitation by the court.)

THE COURT: It is true that the plaintiffs ask this Court to declare underlying judgments void. In effect, the plaintiffs seek to collaterally attack the judgments. This is a precarious position, and neither party has addressed this issue.

But the plaintiffs do not merely raise questions which concern or address the jurisdiction of the Court in the underlying action. The plaintiffs claim that the defendants conspired to and did participate in a fraud which had the effect of depriving the plaintiffs of their day in court and is some instances took away a portion of their wages.

While certain issue are asserted which relate to jurisdiction, they relate to jurisdiction by means of perpetuating the fraud. Moreover, this is not a Court of Appeals, and neither party has addressed the propriety of a collateral attack on the judgments obtained in the municipal court.

This Court concludes, therefore, that the plaintiff is not barred from asserting the facts presented as they relate to the scheme of fraud, but the plaintiffs cannot ask this Court to vacate the judgments in the municipal court or declare them void. The remedy, therefore, is dismissal pursuant to the Illinois Code of Civil Procedure, section 2-615, with leave to amend. This Court will dismiss the complaint sua sponte pursuant to 2-615.

(Thereafter followed additional remarks by the Court and counsel not relevant to the appeal.)

(Proceedings concluded)

[Certificate of Court Reporter omitted in printing.]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MARK CONTRERAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 87 CH 10028
	)	
CITIBANK etc., et al.,	)	
	)	
Defendants.	)	

REPORT OF THE PROCEEDINGS has at the hearing of the above-entitled cause before the Honorable ALBERT GREEN, Judge of said court, on the 29th day of March, 1988, at the hour of 10:00 a.m.

PRESENT:

MR. PETER A. REGULSKI appeared for the Plaintiffs;

MESSRS. SIDLEY & AUSTIN
BY: MR. JON I. FIELDMAN appeared for Citibank;

MESSRS. O'CONNOR & SCHIFF
BY: MS. LORETTA GRIFFIN appeared for Wilk & Waller;

DONALD S. ROTHSCHILD & ASSOCIATES
BY: MR. DONALD S. ROTHSCHILD appeared for Randy Kadet, Scott Mark, Marilyn Kadet and Accurate Process Service.

THE CLERK: Contreras versus Citibank, 87 CH 10028.

THE COURT: Matter comes up on motion for reconsideration. Identify yourselves for the record please.

(Thereafter followed brief remarks by counsel and a factual recitation by the court.)

This Court has thoroughly read all the pleadings, motions, responses and replies tendered in this matter. In dismissing this matter previously, this Court made clear that its not to be substituted as a court of review. That is not its proper role.

Section 2-1401 of the Illinois Code of Civil Procedure, Section B provides a petition for relief from judgments must be filed in the same proceedings in which the order of judgment was entered.

The cases cited by the plaintiffs do not address the situation presented at the case at bar and are, therefore, distinguishable. In this case, plaintiffs are asking this court to declare void the judgments obtained in a court of parallel jurisdiction. The plaintiffs have not presented one case in which a collateral attack was sustained in such a situation.

The motion for reconsideration will be denied. Prepare the appropriate order.

(Thereafter followed additional remarks by the Court and counsel not relevant to the appeal.)

(Proceedings concluded.)

[Certificate of Court Reporter omitted in printing.]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MARK CONTRERAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 87 CH 10028
	)	
CITIBANK etc., et al.,	)	
	)	
Defendants.	)	

REPORT OF THE PROCEEDINGS has at the hearing of the above-entitled cause before the Honorable ALBERT GREEN, Judge of said court, on the 26th day of July, 1988, at the hour of 11:00 a.m.

PRESENT:

MR. PETER A. REGULSKI appeared for the Plaintiffs;

MESSRS. SIDLEY & AUSTIN
BY: MR. JON I. FIELDMAN appeared for Citibank;

MESSRS. O'CONNOR & SCHIFF
BY: MR. ELLIOT R. SCHIFF appeared for Wilk & Waller;

DONALD S. ROTHSCHILD & ASSOCIATES
BY: MR. DONALD S. ROTHSCHILD and MR. ELMER GERTZ appeared for Randy Kadet, Scott Mark, Marilyn Kadet and Accurate Process Service.

THE COURT: Contreras versus Citibank, 87 CH 10028. The matter comes on a motion to strike and dismiss the first amended class action complaint.

Would you identify yourselves for the record.

(Thereafter followed brief remarks by counsel and a factual recitation by the court.)

THE COURT: This court agrees that many of the cases cited by the plaintiffs on the issue of state action are on point. However, it is persuaded by the more recent trend of the supreme court, as evidenced by the decisions defendants cite, that the "public function" conduct of a private party must be narrowly construed in finding state action. These cases indicate that the court did not intend state action to be found where a private party wrongfully uses a statute for its own purpose.

Accordingly, this court finds plaintiffs have not stated a claim for relief under 42 U.S.C. Section 1983.

(Thereafter followed additional remarks by the Court not relevant to the appeal.)

THE COURT: Although plaintiffs argue otherwise, this court has determined that by way of the nature of the relief prayed for, returning sums obtained through the "void" judgments, plaintiff continue to ask this court for relief which it is not empowered to grant. That is a determination that the default judgments rendered in the municipal division are void. This is akin to vacating those judgments.

For these reasons this court will dismiss plaintiffs' first amended complaint.

Once more, listen to me carefully, I am going to grant you the right to file a second amended complaint to see if you can meet muster. This case, if you can meet muster should be transferred to the court of original jurisdiction wherein the judgments were entered. Prepare the appropriate orders.

(Proceedings concluded.)

[Certificate of Court Reporter omitted in printing.]

(2)

No. 90-1224

FILED
FEB 28 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1990

MARK J. CONTRERAS, DONNA A. CONTRERAS and ROBERT SCHMIDT,

Petitioners,

vs.

CITIBANK (SOUTH DAKOTA), A NATIONAL BANKING ASSOCIATION, WILK & WALLER, an Illinois Partnership, RANDY KADET, SCOTT MARKS, MARILYN KADET, and ACCURATE PROCESS SERVICE,

Respondents.

On Petition For A Writ Of Certiorari
To The Appellate Court Of Illinois,
First Judicial District

BRIEF IN OPPOSITION OF RESPONDENT WILK & WALLER

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QUESTIONS PRESENTED

Whether the decision of the Illinois Appellate Court that an Illinois trial court is not empowered to sit in review on another Illinois trial court, that the provisions of the Illinois Code of Civil Procedure govern the conduct of civil litigation in the state courts, and that the Illinois law prohibits litigant forum-shopping invokes this Court's jurisdiction or merits its review.

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No. 90-1224

In The
Supreme Court of the United States
October Term, 1990

MARK J. CONTRERAS, DONNA A. CONTRERAS and ROBERT SCHMIDT,

Petitioners,

vs.

CITIBANK (SOUTH DAKOTA), A NATIONAL BANKING ASSOCIATION, WILK & WALLER, an Illinois Partnership, RANDY KADET, SCOTT MARKS, MARILYN KADET, and ACCURATE PROCESS SERVICE,

Respondents.

On Petition For A Writ Of Certiorari
To The Appellate Court Of Illinois,
First Judicial District

BRIEF IN OPPOSITION OF RESPONDENT WILK & WALLER

Respondent respectfully requests this Court to deny the petition for a Writ of Certiorari for the reasons set forth below

COUNTERSTATEMENT OF THE CASE[1]

Plaintiffs, Mark and Donna Contreras and Robert Schmidt, were extended credit privileges by Citibank. Plaintiffs used those credit privileges and incurred debt to Citibank. The debts which

[1] The Illinois law requires fact pleading and rejects conclusions. The facts of record in this cause, which involves a dismissal pursuant to Section 2-615 of the Illinois Code of Civil Procedure are established by the well-plead facts of plaintiff's First Amended Complaint only, inclusive of exhibits thereto.

plaintiffs admittedly owed to Citibank were not paid and Citibank was forced to bring suit against the plaintiffs seeking payment of those monies (C 292)[2]. The plaintiffs allege that an inconsistent or false affidavit of service was filed in the Cook County municipal court actions brought against them as defendants by Citibank (C 293). They further allege "on information and belief" that the affidavits of service were filed by this defendant, Wilk & Waller (C 293). Plaintiffs do not allege that this defendant prepared the affidavits of service or participated in any manner in their preparation. Further, there is no allegation that this defendant instructed the private process server with regard to service in the municipal actions or the preparation of the affidavits of service.

Judgment was entered against Mark and Donna Contreras on August 25, 1987, in municipal action 87 M1 30654, for the amount they owed to Citibank (C 297). The Contrerases do not contest that they owed the money to Citibank or that they failed to pay it. The municipal action brought against them by Citibank was well grounded and they admit they had no defense to it.

Similarly, Robert Schmidt does not contest that he owed the money to Citibank or that he failed to pay it prior to municipal action 87 M1 102541 being brought against him. Schmidt does not plead that he had a meritorious defense to Citibank's action against him. Judgment was entered against Schmidt and in favor of Citibank on May 19, 1987 (C 299).

Schmidt never contested the entry of judgment against him in the municipal action. Taking his affirmative allegations as true, Schmidt settled the matter, paying the judgment against him voluntarily. On July 10, 1987 a release of the judgment against Schmidt was filed. Further, a stipulation to dismiss the garnishment was prepared by Wilk & Waller and filed by Schmidt's employer, the Chicago Park District, on August 18, 1987 (C 299; C 177). Schmidt does not allege that his wages were ever in fact garnished.

Mark and Donna Contreras retained the services of attorney Peter A. Regulski (the plaintiffs' attorney herein) with regard to the municipal action brought by Citibank against them in the Municipal Court of Cook County. On September 24, 1987,

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[2] The citations herein reference the common law record.

attorney Regulski filed a Motion to Vacate the judgment entered against the Contrerases on August 25, 1987 in the municipal court (C 116). The motion to vacate was brought pursuant to Section 2-1301 of the Illinois Code of Civil Procedure (C 116). On behalf of the Contrerases, attorney Regulski noticed that motion for an initial hearing date of October 1, 1987 at 2:00 p.m. (C 115).

On October 1, 1987, attorney Regulski appeared before the Honorable William D. Kelly in a municipal courtroom of the Daley Center and presented and argued the merits of the Contrerases' motion to vacate under Section 2-1301 (C 182; C 190). In oral argument on that motion, Judge Kelly inquired as to whether the Contrerases had a meritorious defense to Citibank's action against them (C 186). No meritorious defense was stated for the record at that time. Consistently, plaintiffs Mark and Donna Contreras plead in the instant action that they in fact were in arrears and owed the money to Citibank.

After Judge Kelly indicated that he would continue the Contrerases' motion under 2-1301 from October 1, 1987 to October 15,1987, attorney Regulski sought leave to file instanter a Special and Limited Appearance on behalf of Mark and Donna Contreras and a Motion to Quash Service of Summons, typed documents which he had previously prepared (C 189; C 192). Attorney Regulski also initiated a Petition for a Rule to Show Cause on the private process server under Section 2-203 of the Illinois Code of Civil Procedure (C 194). Plaintiffs' motion to vacate under Section 2-1301 was continued to October 15th at 2:00 p.m. by court order (C 188).

On October 13, 1987, Mark and Donna Contreras, through attorney Regulski, filed a Motion for Leave to Withdraw their Petition for a Rule to Show Cause against the private process server (C 217) and an amended Motion to Quash (C 196).

On October 15, 1987 at 1:18 p.m., attorney Regulski filed the instant Chancery action in the Chancery Division of the Circuit Court of Cook County, Illinois[3]. At 2:00 p.m. on the same date, attorney Regulski appeared in the municipal courtroom and

[3] The Cook County Court system is organized into numerous separate divisions. Among these, the Municipal Division handles claims for less then $15,000.00, and the Chancery Division handles various claims in equity, declaratory actions and class actions.

offered to pay the outstanding balance owed by Mark and Donna Contreras to Citibank, in full settlement and release of the municipal action brought by Citibank (C 74-75). Attorney Regulski issued his personal check on his own account for the sum owed by his clients, Mark and Donna Contreras. The check was written in the presence of Wayne Waller in the municipal courtroom on October 15, 1987 at approximately 2:30 p.m. (C 75). Thereafter, in lieu of proceeding on any of the motions he had filed on behalf of Mark and Donna Contreras in the municipal action, attorney Regulski tendered a typed order dismissing the municipal cause of action by agreement (C 112).

The typed, agreed order dismissing Citibank's claim against Mark and Donna Contreras was entered on the 2:00 motion call in municipal court, on October 15, 1987 (C 112). At that time, attorney Regulski withdrew all previous motions filed on behalf of Mark and Donna Contreras and negotiated a settlement of Citibank's claim against the Contrerases. Forty-two minutes earlier, at 1:18 p.m. on October 15, 1987, attorney Regulski had filed the instant Chancery litigation (C 02).

In the instant action, this defendant, Wilk and Waller, filed a motion to disqualify attorney Regulski and a motion to dismiss Mark and Donna Contreras as representative plaintiffs. The disqualification of attorney Regulski was premised on his payment of the Contrerases' debt to Citibank with his own personal check in violation of Canon 5 of the applicable Code of Ethics (C 69-73). The motion to dismiss Mark and Donna Contreras as representative party plaintiffs was premised on their voluntary submission to the jurisdiction of the Municipal Court on October 1, 1987 and their settlement of the claim of Citibank against them. The motion further noted the problem of two simultaneously pending actions on the same issue, one in the Municipal Division and one in Chancery (C 77-81).

Briefs were submitted and a contested hearing was held with regard to this defendant's motion to disqualify and its motion to dismiss the Contrerases as party plaintiffs. In reviewing those motions, the Chancery Court necessarily reviewed the plaintiffs' original Complaint. Although Judge Green denied the pending motions, the plaintiffs' original Complaint at Law was dismissed *sua sponte* under Section 2-615 for failing to state a cause of

action. The court specifically focused on plaintiffs improper request for relief, stating:

> Moreover, this is not a Court of Appeals, and neither party has addressed the propriety of a collateral attack on the judgments obtained in the Municipal Court. This court concludes, therefore, that the plaintiff is not barred from asserting the facts presented as they related to the scheme of fraud, but the plaintiffs cannot ask this court to vacate the judgments in the Municipal Court or declare them void. (January 27, 1988 R.P. 15).

Plaintiffs were granted leave to file a First Amended Complaint.

Plaintiffs' Motion for a Reconsideration of the Chancery Court's *sua sponte* dismissal of the original Complaint was denied on March 29, 1988, after briefs were submitted and a contested hearing was held. The Chancery Court again indicated that the plaintiffs' request for relief was improper, stating:

> In dismissing this matter previously, this court made clear that its not to be substituted as a court of review. That is not its proper role. (March 29, 1988 R. P. 6).

On April 12, 1988, plaintiffs filed a First Amended Class Action Complaint (C 290 - 316). The factual allegations of the First Amended Complaint were virtually identical to those of the original Complaint. Count I of the original Complaint, which sought a declaration from the Chancery Courts that multiple municipal judgments were void, was not plead again in the First Amended Class Action Complaint.

Plaintiffs' First Amended Complaint contained seven counts. The factual allegations for each of the seven counts were the same. Count I alleged a violation of 42 U.S.C. Section 1983 and labeled itself as a conspiracy count (C 301). Count II duplicated the allegations of Count I that 42 U.S.C. Section 1983 had been violated, but deleted the charge of conspiracy (C 304). Count III alleged a common law fraud (C 305). Count IV alleged a violation of the Illinois Consumer Fraud and Deceptive Practices Act (C 308). Count V alleged an "implied cause of action" under Section 2-203 of the Illinois Code of Civil Procedure (C 309). Count VI was premised on Section 12-817 of the Illinois Code of Civil Procedure (C 311). Count VII was labeled as a negligent hiring and failure to supervise count (C 312).

Each of the seven counts of plaintiffs' First Amended Complaint sought the following relief:

a) compelling Citibank to return any and all money obtained as a result of said void judgments with statutory interest thereon from the date of collection (except in the case of Mark J. and Donna A. Contreras);

b) compelling Wilk & Waller to return any and all money obtained for costs and attorneys fees as a result of said void judgment with statutory interest thereon from the date of collection (except in the case of Mark J. and Donna A. Contreras);

c) awarding the plaintiff class compensatory damages in the amount of $2,500.000.00;

d) awarding the plaintiff class punitive damages in the amount of $5,000,000.00; and

e) granting the plaintiff class such relief as this Honorable Court deems just and appropriate, including, but not limited to, costs and reasonable attorney's fees.

Each of the defendants filed a motion to strike and dismiss all seven Counts of the plaintiffs' First Amended Complaint. The motion of this defendant filed on April 28, 1988 challenged the plaintiffs' request for relief in each of the Counts as wholly improper, in that it sought return of money obtained because of void judgments. The request for relief by its nature required a determination that the judgment was in fact void and sought an order which effectively vacated the judgment. This defendant further contested the factual sufficiency of each of plaintiffs' Counts under Section 2-615 of the Illinois Code of Civil Procedure (C 323 - 332).

After reviewing briefs submitted on the issues, the Chancery Court held that each Count of plaintiffs' First Amended Complaint was factually insufficient and that each Count improperly prayed for relief which the Chancery Court could not grant. The court specifically stated:

> Although plaintiff argues otherwise, this court has determined that by way of the nature of the relief prayed for, returning sums obtained through the "void" judgments, plaintiff continues to ask for relief which it is not empowered to grant. That is a determination that the default judgments rendered in the Municipal Division are void. This is akin to vacating those judgments.
>
> (R.P., July 26, 1988, p. 18).

Leave to file a Second Amended Complaint was extended to the plaintiffs. The Chancery Court granted plaintiffs 28 days in which to file a Second Amended Complaint (C 411).

On September 2, 1988 plaintiffs were granted an extension of time in which to file a Second Amended Complaint (C 416). On September 13th, plaintiffs were granted another extension of time in which to file a Second Amended Complaint (C 421).

Plaintiffs elected not to file a Second Amended Complaint. On September 27, 1988, plaintiffs filed an election to stand on their pleadings and a motion for a final order of dismissal (C 424 - 427). An order prepared by counsel for the plaintiffs was submitted on October 14, 1988 and entered (C 432).

While the cause was styled as a class action at the trial level, no class was ever certified by the trial court[4]. The trial court therefore did not address the claims of the class, but merely the claims of those individual plaintiffs before it.

A timely notice of appeal from the October 14, 1988 order of dismissal was filed by the plaintiffs. Thereafter, briefs were filed by the parties and oral argument was heard. On May 18, 1990, the First District Appellate Court affirmed the dismissal order of the trial court on the basis that each Count of plaintiff's First Amended Complaint sought relief that the trial court was not empowered to grant. Addressing that issue, the First District Appellate Court stated:

> In effect, the three named plaintiffs asked the chancery division to review the municipal division's action. We find no law permitting such a review.

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[4] Plaintiffs erroneously refer to a class action in the briefs and argument. A class was never certified and only the claims of the individually-named plaintiffs were at issue.

> Plaintiffs are not seeking to enforce the judgments in the underlying suits. Instead, they are seeking to sidestep the municipal division's decision in regard to the default judgments by going over to chancery as an alternative forum. Plaintiffs' attempt to rely on collateral attack here is merely forum shopping, which is not permitted under the law.

The First District Appellate Court affirmed the trial court's dismissal, holding that the Illinois trial court is not empowered to sit in review, that the Code of Civil Procedure governs the conduct of civil litigation and that the plaintiffs were engaged in forum shopping. Because each of plaintiffs' seven counts sought identical relief, each count was subject to dismissal for the same reason. Therefore, the First District Appellate Court did not reach or address the issues of the factual insufficiency of each count in the opinion it rendered.

Plaintiffs filed a timely Petition for Leave to Appeal with the Illinois Supreme Court which was denied on October 2, 1990.

REASONS FOR DENYING THE WRIT

I.

THE RULING OF THE ILLINOIS APPELLATE COURT ADDRESSED THE PROCEDURAL IMPROPRIETY OF THE PLAINTIFFS' CAUSES OF ACTION ONLY, AND FAILS TO INVOKE THE JURISDICTION OF THIS COURT.

In seeking review of this Court, Plaintiffs posit that the interpretation of 42 U.S.C., Section 1983 was at issue in the underlying Illinois Appellate Court decision. The rationale and holding of the Illinois Appellate Court is clearly to the contrary. In its decision, the Illinois Appellate Court declines to address the factual insufficiency of any of the Plaintiffs' seven counts, inclusive of the two counts purportedly predicated on Section 1983. In affirming the trial court's dismissal of the plaintiffs' complaint, the Illinois Appellate Court focused on the procedural impropriety, highlighted by plaintiffs' repeated prayer that the Chancery Court order a return of voluntarily paid municipal court judgments.

By its nature, plaintiffs' prayer for relief required the Chancery Court to sit as a court of appeal and review over the municipal courts which had entered the judgments. The Appellate Court agreed with the Chancery Court that it was not empowered to review. On this basis the dismissal of all of the plaintiffs' counts was affirmed.

The first four issues which plaintiffs frame as "Questions Presented" to this Court were neither presented to nor decided by the Illinois Appellate Court. The Appellate Court addressed the Section 1983 counts in the same manner as plaintiffs' other state law counts: each count prayed for relief that the trial was not empowered to grant and therefore each was appropriately dismissed.

The Illinois Appellate Court did not hold that a litigant "must exhaust" state court remedies as a pre-requisite to a Section 1983 action or that a default judgment cannot be vacated in the absence of a meritorious defense. The Appellate Court never mentioned the doctrine of collateral estoppel in its decision, nor did the plaintiffs argue in that vein at the Illinois appellate level.

The Appellate Court did hold that a Section 1983 action cannot be used to request vacatur of a judgment. The power to vacate a trial court judgment rests with the trial court which entered it and with the empowered courts of review, within the guidelines of codified procedure. To hold otherwise encourages litigant forum shopping and "could lead to displacing almost all of the civil law of the states into the federal courts" . *Del's Big Saver Foods, Inc. vs. Carpenter Cook, Inc.*, 795 F. 2d 1344 (7th Cir 1986). Such a result places the integrity of the state court system in jeopardy, subject to the whim of a litigant who has a simple avenue for complete relief open to him under state law.

The decision of the Illinois Appellate Court centered on state procedural law. The validity of a federal right was not at issue. This court's jurisdiction is not invoked and the instant petition should be denied.

II.

THE ILLINOIS APPELLATE COURT PROPERLY HELD THAT THE POWER TO REVIEW AN ILLINOIS TRIAL COURT DECISION IS RESERVED TO THE APPELLATE COURTS AND SUPREME COURT OF THE STATE OF ILLINOIS.

The essential issue on which the Illinois Appellate Court decided the instant appeal is whether a trial court has the power to vacate the judgment of another court of concurrent or parallel jurisdiction. Plaintiffs' original Complaint in Chancery sought an order vacating the judgments entered against them in the Municipal division trial courts. The First Amended Complaint sought an order declaring those judgments void and compelling a return of the money obtained as a result of "said void judgments". The Chancery Court rejected both Complaints because of the nature of the prayer for relief plead by the plaintiffs. It refused to review the proceedings of its sister court to determine either jurisdictional issues or the propriety of the entry of judgments in that court. The Chancery Court repeatedly noted that relief from the judgments of the Municipal division was available in the Municipal division trial court. Plaintiffs however refused to return to the trial courts which had entered the judgments against them, but opted to initiate an appeal.

Plaintiffs' cause of action was dismissed pursuant to a motion under Section 2-615 of the Illinois Code of Civil Procedure, which by its procedural nature concedes the truth of all well-plead facts. At the trial level and at the appellate level, the defendants accepted those facts as true. Further, the recitation of facts in the Appellate Court's opinion demonstrates that those facts were reviewed in detail by it.

Due process is not an issue in the case at bar. The United States Supreme Court decision of *Peralta v. Heights Medical Center, Inc.*, 484 U.S. 80, 108 S. Ct. 196 (1988), on which Plaintiffs rely, can be contrasted with the instant case. In *Peralta*, the Texas rules of civil procedure operated to deny a defendant who had never been served an avenue of relief in the trial court. The United States Supreme Court held that the Texas statutory scheme as implemented violated due process of law.

The Illinois rules of civil procedure do not operate with that effect. The actions taken by attorney Regulski on behalf of the Contrerases in the municipal action demonstrate that Illinois law always allows an avenue of relief where service is improper. In fact, Mark and Donna Contreras filed a special and limited appearance and a motion to quash in the municipal trial court in an attempt to obtain relief from the judgment which had been entered against them (C 189; C 192). Unlike the *Peralta* case, the Illinois statutory scheme is designed to safeguard due process. Simultaneously, Illinois procedural law protects the integrity of the judiciary and prohibits forum shopping.

The Illinois Code of Civil Procedure provided various methods by which the plaintiffs could have pursued relief in the municipal division. The codified Illinois law consistently protects rights of due process. Plaintiffs voluntarily abandoned the municipal division trial courts. In truth, their complaint is not raised against a denial of due process, but rather against the long-recognized rule of the Illinois law that a litigant is not allowed to forum shop. Enforcement of that rule by the Chancery Court and the First District Appellate Court was proper.

The approach of the Illinois law to judge shopping does not merit the attention of this court. The Supreme Court of Illinois iterated its stance on litigant forum shopping in the 1983 decision of *Balciunas v. Duff,* 94 Ill.2d 176 (1983). The standard of the Illinois law is set out clearly in that decision. Plaintiffs' efforts to disguise forum shopping by styling a law suit as either a Section 1983 action or a class action does not render it more palatable to the court.

Plaintiffs assert that state procedural law must yield to federal rights and rely on *Robertson v. Wegmann,* 436 U.S. 584 (1978). *See* plaintiffs' Petition, at 14. Their reliance is misplaced. In *Robertson,* the State's restriction on survivorship rights was recognized, resulting in an abatement of an otherwise viable Section 1983 action. 436 U.S. 584, 592. The *Robertson* decision demonstrates that unless the state procedural law operates to violate a constitutional right, it is fully enforced by the federal courts.

The Chancery Court and the First District Appellate Court were correct in holding that plaintiffs' request that one trial court

review the decisions of a trial court of parallel jurisdiction was procedurally improper. The pivotal issue in this case was procedural. The Chancery Court and the Appellate Court adhered to the Illinois law in refusing to allow a trial court to sit in review, in prohibiting litigant forum shopping and in allowing the provisions of the Illinois Code of Civil Procedure to govern the conduct of the litigation.

III.

THE CHANCERY COURT CORRECTLY RECOGNIZED THAT IT WAS NOT EMPOWERED TO VACATE OR DECLARE VOID A JUDGMENT OF THE MUNICIPAL COURT.

The Circuit Court of Cook County is divided into numerous divisions, in accordance with the type of claim being made and in some instances the amount in controversy. For example, personal injury claims in excess of $15,000.00 pend in the Law Division. Similar claims for less than $15,000.00 pend in the Municipal Division. Property damage and contract cases also fall within the scope of the Municipal Division but are generally assigned to a separate set of court rooms. Other divisions such as Domestic Relations, Criminal and Probate handle cases of a specific nature as denoted by their titles.

The Chancery Division of the Circuit Court of Cook handles a particular type of litigation, inclusive of a foreclosure action on real property, a suit for a declaration of rights under an insurance contract and class action litigation.

There is no Cook County Circuit Court rule which attempts to grant the Chancery Courts the power to review the rulings of the courts of other divisions. Similarly, the Illinois Code of Civil Procedure contains no provisions which grant the Chancery Court or any court of equity the power of review. Finally, the common law does not bestow any right on the Chancery Court to review the judgments of a court of parallel jurisdiction.

The right to review the decision of a trial court is held by the Appellate Courts and the Supreme Court of Illinois. To pursue an appeal from a Trial Court order and obtain a review, certain procedural rules must be followed. *See,* Ill. Rev. Stat. ch. 110(ā), par. 301, *et seq.* Strict adherence to the rules is requisite to the

appeal and review process. *See, e.g., Elg v. Whittington,* 149 Ill. App.3d 307 (1986), aff'd 119 Ill.2d 344 (1987).

The named plaintiffs in the case at bar alleged that judgments were entered against them in certain Municipal Court actions. In Count I of their original Complaint in the Chancery action, and in each count of the First Amended Complaint, plaintiffs requested the Chancery Court to vacate the judgments entered against them in the Municipal Courts, to declare the judgments void and to order a return of the monies plaintiffs paid voluntarily to satisfy those judgments. After reviewing plaintiffs' pleading with regard to other pending motions, the Chancery Court *sua sponte* dismissed plaintiffs' original Complaint at Law because it requested relief which the court was not empowered to grant. In addressing the sufficiency of the First Amended Complaint, the Chancery Court again held the prayer for relief in each Count improper. Specifically noting that it was not a court of appeal and had no powers of review, the Chancery Court stated that it could not vacate the judgments of the Municipal Court or declare them void.

Plaintiffs imply by their statement of the questions presented to this Court that the Chancery Court gave the municipal judgments " collateral estoppel" effect, i.e. that it presumed the judgments were valid. To the contrary, the Chancery Court refused repeatedly to rule on the issue. Collateral estoppel was never applied.

The Chancery Court's recognition that it could not vacate or declare void a judgment of the Municipal Court was correct under the law. The procedural rules of the State of Illinois provide numerous avenues for vacating a judgment at the trial court level. Plaintiffs' contention that those rules can be ignored and that the common law doctrine of collateral attack is sufficient to allow one court of parallel jurisdiction to sit in review on another is legally ill-premised. Moreover, acceptance of such a theory would play havoc with the current court structure in Cook County and the entire State. The Chancery Court cannot review or reverse the Municipal Court. The Chancery Court was correct in recognizing the limitations of its powers and dismissing the plaintiffs' claim for relief.

Acting in its designated role as a court of review, the Illinois Appellate Court affirmed the Chancery court's decision. It rejected the plaintiffs' argument affirmatively and held that the common law doctrine of collateral attack cannot be employed to nullify the codified procedural rules of the State of Illinois.

A.

THE PROVISIONS OF THE ILLINOIS CODE OF CIVIL PROCEDURE OUTLINE THE APPROPRIATE PROCEDURE FOR VACATING A JUDGMENT AT THE TRIAL COURT LEVEL.

The provisions of the Illinois Code of Civil Procedure are comprehensive in nature and designed to protect the rights of all litigants. Two specific sections of the Code outline avenues of relief from a judgment entered. A separate provision outlines the appropriate procedure for contesting the jurisdiction of the court over the person of the defendant. In contrast, the Code does not outline a procedure which allows a Chancery Court to review the propriety of judgments entered by a municipal or small claims court.

Within 30 days of the entry of a judgment, a litigant may move the court under the provisions of Section 2-1301(e) to vacate the judgment "upon any terms and conditions that shall be reasonable." Ill. Rev. Stat. ch. 110, par. 2-1301 (1983).

After the passage of 30 days, a litigant can apply for relief from a judgment under the provisions of Section 2-1401 of the Code. Ill. Rev. Stat. ch. 110, par. 2-1401 (1982). Section 2-1401, allows a party to apply for relief from a judgment order which is over 30 days old within two years after the date of entry of the order of judgment. The requisites under Section 2-1401 are specific. *See, e.g., Armis Construction Co. v. Cosmopolitan National Bank,* 134 Ill. App.3d 177 (1985). The 2-1401 petition must be filed in the same proceeding in which the judgment was entered and must be supported by affidavit. *Lofendo v. Ozog,* 118 Ill. App.3d 237 (1983).

Where a litigant seeks to contest the jurisdiction of the court over his person, a special and limited appearance may be filed in accordance with the dictates of Section 2-301 of the Code. Ill. Rev. Stat. ch. 110, par. 2-301 (1982). This Section allows a party to contest the court's jurisdiction over him and adduce evidence

on that issue. A special and limited appearance can be made post-judgment to contest the jurisdiction of the court. *Washington v. Clayter,* 91 Ill. App.3d 489 (1980). A determination by the court that it did not have jurisdiction over the person at the time the judgment was entered, renders the judgment of no effect. *LaMotte v. Constantine,* 92 Ill. App.3d 216 (1980).

Each of these provisions of the Illinois Code of Civil Procedure outlines the proper method for vacating a judgment or contesting the jurisdiction of the court. The named plaintiffs had the full opportunity to move the Municipal Court under any of those sections for relief, if they felt they were so entitled. In fact, Mark and Donna Contreras, through their attorney, Peter Regulski, presented a motion to vacate under Section 2-1301 and a subsequent motion to quash, erroneously brought under Section 2- 203 (C 116; C 90). Prior to the Municipal Court determining either of the motions, the Contrerases opted for an agreed order of settlement. Significantly, the chancery "class action" which requested the Chancery Court to review the Municipal Court judgments was filed approximately one hour before the Contrerases opted to abandon their motion to vacate under the Code and enter an agreed order of settlement in the municipal case (C 02 [Chancery Complaint filed 1:18 p.m. on October 15, 1987] and C 112 [order entered on 2:00 p.m. motion call in municipal court]). In essence, the Contrerases ultimately requested the Chancery Court to review an order of the Municipal Court which they declined to allow the Municipal Court itself to reconsider under the applicable procedural provisions. The Contrerases took the issue away from the Municipal Court, which had entered the judgment, and attempted to bring it to the Chancery Court in the form of a class action. The Chancery Court correctly recognized the impropriety of the procedure. It informed the plaintiffs emphatically and repeatedly that it would not sit as a court of review.

The Appellate Court affirmed the Chancery Court's ruling. It specifically noted that the law does not permit such a review. Its limitation of the review process to the authorized courts of review is a well-understood principle in the Illinois law.

B.

THE DOCTRINE OF COLLATERAL ATTACK IS DESIGNED TO PREVENT ENFORCEMENT OF A DEMONSTRABLY VOID JUDGMENT, NOT AS AN ALTERNATE AVENUE OF REVIEW.

Plaintiffs' request for relief to the Chancery Court was that it vacate multiple judgments entered in the Municipal Court. The issue presented to the Chancery Court was whether it had the power to vacate the municipal judgments. The Chancery Court could not and did not reach any further issue with regard to those judgments. Similarly, the analysis of the Illinois Appellate Court terminated on that procedural issue.

Plaintiffs misapprehend and consequently misapply the doctrine of collateral attack in arguing that the Chancery Court was empowered to vacate judgments of a court of parallel jurisdiction. Plaintiffs attempt to use the doctrine as an alternate method of review. This application is contrary to existent Illinois law and the strict requirements of appellate procedural rules.

A judgment which is void can be attacked directly in any of the manners outlined by the Illinois Code of Civil Procedure, discussed above. A direct attack must be taken to the court which entered the judgment. The cases cited by the plaintiffs at the Illinois appellate level are illustrative of this principle. For example, in *State Bank of Lake Zurich v. Thill,* 135 Ill. App.3d 747 (1985), the defendant contesting the validity of the judgment entered against him entered a special and limited appearance and asserted that the court lacked personal jurisdiction over him. The special and limited appearance and motion contesting jurisdiction were presented to the same court which entered the judgment. Similarly, in *Just Pants v. Bank of Ravenswood,* 136 Ill. App.3d 543 (1985), a special and limited appearance and motion contesting jurisdiction were presented to the same court which entered the judgment at issue.

Each of the cases cited by the plaintiffs addresses a situation in which either a direct attack against a judgment is taken to the same court which entered the judgment or the judgment is attacked collaterally by the person against whom the judgment is sought to be enforced. The trial court in the case at bar was therefore correct when it stated in its ruling from the bench on

March 29, 1988, denying plaintiff's motion for a reconsideration of the January 27, 1988 *sua sponte* dismissal:

> The cases cited by the plaintiffs do not address the situation presented at the case at bar and are, therefore, distinguishable. In this case, plaintiffs are asking this court to declare void the judgments obtained in a court of parallel jurisdiction. The plaintiffs have not presented one case in which a collateral attack was sustained in such a situation. (March 29, 1988 R.P. 6)

The doctrine of collateral attack is designed to be used as a shield against the enforcement of judgments which are not viable. The use of the doctrine of collateral attack does not vacate a judgment or render it void as a matter of public record. A successful collateral attack simply renders the judgment unenforceable in the proceeding in which it is used and against the person asserting the doctrine. A classic example is found in the Supreme Court case of *Reynolds v. Burns,* 20 Ill.2d 179 (1960). The Illinois Supreme Court described the proper use of a collateral attack in the case before it in *Reynolds,* stating:

> A void judgment can be impeached at any time in any proceeding *whenever a right is asserted by reason of that judgment,* and it is immaterial, in a consideration of the validity of the judgment, whether or not the time for review by appeal has expired (citations omitted). In this case the validity of the judgment is first put in issue when the court is called upon to pass upon the validity of the title of the plaintiffs. *Reynolds v. Burns,* 20 Ill.2d 179, 185 (1960). (emphasis added).

In their petition to this Supreme Court, plaintiffs cite federal case law which defines the concept of collateral attack in a manner consistent with the Illinois law generally and as applied in the instant case. A proper collateral attack "means only that for purposes of the matter at hand the judgment must be deemed without *res judicata* effect. . ., the judgment neither justifies nor bars relief from its consequences." *Schlesinger v. Councilman,* 420 U.S. 738, 746-747 (1975). The federal law does not recognize a collateral attack as an alternate avenue of review or a means of conferring appellate jurisdiction. A collateral attack operates to impeach a judgment, not to vacate it. 420 U.S. 738, 749.

To allow the concept of collateral attack to be used as a sword, allowing one court to vacate the judgment of another court without time limitation, renders the procedural rules set out in the Illinois Code of Civil Procedure insignificant. Moreover, it would run contrary to the original intent of codifying procedure. Plaintiffs' attempt to use the common law doctrine of collateral attack to vacate and nullify Municipal Court judgments is akin to use of the common law writ of *scire facias* to repeal letters patent. The Illinois law specifically abolished that writ, further reflecting the legislative intent that the Code of Civil Procedure govern pending litigation. Ill. Rev. Stat., ch. 110, par. 2-1601 (1982).

Currently, the Illinois law has specific rules with regard to a change of venue from a particular courtroom or judge. The general rules are set out in Section 2-1001 of the Illinois Code of Civil Procedure. Ill. Rev. Stat., ch. 110, par. 2-1001 (1982). If, however, the doctrine of collateral attack can be used as the plaintiffs propose, the one employing the doctrine has a choice of venue in seeking review in a trial court of parallel jurisdiction. The action can be initiated in another division of the same system or another court. The result is blatant forum shopping, an activity which the Code prohibits and on which the Illinois law has always frowned. Ill. Rev. Stat. ch. 110, par. 2-1002 (1982); *Balciunas v. Duff*, 94 Ill.2d 176 (1983).

As the record in the case at bar demonstrates, Mark and Donna Contreras, through their attorney, Peter Regulski, were having difficulty initially convincing the Municipal Court that their motion to vacate the judgment entered against them was meritorious (C 186). After presenting the 2-1301 motion to vacate on October 1, 1987, they sought leave to file prepared, typed documents to pursue a motion to quash (C 189; 192). They did not allow the municipal court to rule on either motion. Ultimately, the Contrerases chose not to pursue their motions at the Municipal level and entered into a settlement agreement. At the time the Contrerases paid their debt to Citibank and dismissed the municipal action by agreement, they had already turned to the Chancery Court as an alternate forum (C 02) asking it to vacate a judgment which they voluntarily paid by settlement (C 747; C 112).

Similarly, Schmidt voluntarily settled the Municipal action against him, obtaining a release and satisfaction of judgment. He took no steps at the Municipal level to quash service under Section 2-301 of the Code or to petition for relief under Section 2-1401. His first and only attempt to vacate the Municipal Court judgment was made in the Chancery Court, after attorney Regulski contacted him as a purported witness to the validity of service on Mark and Donna Contreras.[5] Schmidt did not contest judgment at the municipal level. He settled and obtained a release and satisfaction of judgment (C 299; 177).

At issue in the *Balciunas* case was the modification by a trial judge of a discovery order previously entered by a different judge sitting in the same courtroom. As the Illinois Supreme Court noted in reviewing the modification of the discovery order, the order was interlocutory in nature and the trial court had the requisite jurisdiction to review and modify the first judge's order. However, even though the trial judge was merely reconsidering the order of a prior judge, the Supreme Court noted the problems of forum shopping and imposed a strict standard on reconsideration, stating as follows:

> . . . we think it is particularly appropriate for a judge before whom a motion for reconsideration is pending to exercise considerable restraint in reversing or modifying previous rulings. This is especially true if there is evidence of "judge shopping" or it is apparent that a party is seeking, for delay or abusive purposes, a reconsideration of prior rulings. *Balciunas v. Duff,* 94 Ill.2d 176, 181 (1983).

The case at bar did not involve a motion to reconsider an interlocutory order. Rather, plaintiffs asked the Chancery Court to review multiple final judgments of the Municipal Court. The record discloses intentional forum shopping on the part of Schmidt and the Contrerases. Further, in any instance where a litigant turns to the courts of a separate division for a review of another court's judgment, under the guise of collateral attack, the inference of forum shopping arises.

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[5] Defendant notes that this "fact" is neither of record nor previously referred to by Plaintiff Schmidt in this cause. Further, Schmidt's potential knowledge as to the validity of service on Mark and Donna Contreras is not explained.

The interpretation of the scope of the doctrine of collateral attack by the Chancery Court and the Illinois Appellate Court was proper. The doctrine can not be used as an alternative to appeal and review under the applicable procedural rules. Similarly, the doctrine of collateral attack should not be recognized as a tool to circumvent the specific requirements of Sections 2-1301, 2-1401 and 2-301 of the Illinois Code of Civil Procedure. The Chancery Court correctly held that it was not empowered to vacate the judgments of the Municipal Court or declare them void. The Illinois Appellate Court properly affirmed.

IV.

COUNTS I AND II OF PLAINTIFF'S FIRST AMENDED COMPLAINT WERE FACTUALLY INSUFFICIENT AND FAILED TO STATE A CAUSE OF ACTION UNDER SECTION 1983.

Plaintiffs original Complaint in Chancery was dismissed by the court *sua sponte* on January 27, 1988. At that time, the court commented on several deficiencies in plaintiffs' pleading, in addition to plaintiffs' improper request for the relief of vacating the Municipal Court judgments or declaring them void. After a denial of their motion to reconsider, plaintiffs filed a First Amended Class Action Complaint on April 12, 1988 (C 290 - C 320).

The sufficiency of each of plaintiffs' substantive counts for relief, as well as the impropriety of the nature of the relief requested, was challenged by each of the defendants to this action. Wilk and Waller moved to strike and dismiss each count of plaintiffs' First Amended Complaint by motion filed April 28, 1988 (C 323 - C 332). On July 26, 1988 the court sustained the motion of Wilk and Waller and similar motions filed by the co-defendants, but again granted plaintiffs the opportunity to file an amended pleading (C 411). Two extensions of time to file the second amended pleading were also given to the plaintiffs (C 416, C 421). Plaintiffs ultimately elected not to file a second amended pleading. In lieu thereof, they filed an Election to Stand on the First Amended Complaint and a Motion for a Final Order of Dismissal (C 424 - C 427). Plaintiffs' motion was allowed and, by their own election, Counts I through VII of the First Amended Complaint were dismissed.

There is no question as to the exercise of the Chancery Court's discretion in allowing leave to amend. Every opportunity was extended to the plaintiffs to plead facts in support of their multiple theories of recovery. Leave to file a Second Amended Complaint and an extension of time in which to file a Second Amended Complaint were granted to the plaintiffs. It must be assumed from plaintiffs' election to stand on the First Amended Complaint and the factual allegations contained therein, that they could not in good faith plead further facts in support of their various counts.

In reviewing the sufficiency of plaintiffs' First Amended Complaint, the court reviewed each and every count contained therein, analyzing the facts alleged under the applicable Federal or Illinois law. The court properly applied Illinois pleading law, looking only to the facts plead and rejecting conclusory allegations. *Knox College v. Celotex Corp.*, 88 Ill.2d 407 (1981). The court determined that each count was factually insufficient and failed to state a cause of action. As to each Count, the court's analysis was sound, and consistent with prevailing law. Counts I and II of the plaintiffs' First Amended Complaint are deficient and were properly stricken under Section 2-615 of the Illinois Code of Civil Procedure.

Counts I and II of plaintiffs' First Amended Complaint are both purportedly premised on Section 1983 of 42 U.S.C. Count I is entitled "Conspiracy to Violate Civil Rights" , while Count II repeats the allegations of Count I, eliminating the conspiracy charge[6]. Both Counts wholly fail to state a cause of action.

To allege a good cause of action under Section 1983, a plaintiff must demonstrate that the conduct complained of deprived him of a constitutionally protected right and that the conduct causing the deprivation was fairly attributable to the State. In the case at bar, plaintiffs fail with regard to both essential elements.

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[6] It is unclear from the Petition for Writ of Certiorari whether Plaintiffs intend to bring both counts to this level of review, as they do not argue that the independent actions of this Defendant were under color of state law. Defendant notes that although plaintiffs' arguments focus on the private process servers, Plaintiffs insist on attempting to bring this Defendant and Citibank to this Supreme Court. Therefore, full responsive arguments are submitted.

As the record demonstrates, the Contrerases actually appeared in the underlying municipal action and negotiated a settlement of the claim of Citibank against them. It can hardly be maintained in light of those facts that the Contrerases were denied due process.

Similarly, the remaining representative plaintiff, Robert Schmidt, plead that he settled the cause of action against him by voluntary payment. See paragraph 39 of the First Amended Complaint (C 299). Moreover, Schmidt did not affirmatively plead that he never received service of process or notice of the pending collection action against him. Like the Contrerases, Schmidt plead that he in fact owed the money to Citibank and that he paid it voluntarily.

Deprivation of a constitutionally protected right requires proof of actual injury. A complaint of a denial of procedural due process, absent any allegation of injury sustained, is insufficient to support a claim under 1983. *Carey v. Piphus,* 435 U.S. 247 (1978). Plaintiffs' failure to plead an injury sustained defeats their purported cause of action under Section 1983. They fail to allege facts to support deprivation of a constitutionally protected right.

Plaintiffs also fail to show that the conduct allegedly engaged in was fairly attributable to the State. To demonstrate State action as required under Section 1983, plaintiffs must show that the allegedly wrongful action was a result of the exercise of a State-created right or privilege and that the party charged with the deprivation is a State official or someone whose conduct is otherwise chargeable to the State. *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149 (1978). The allegations of fact in plaintiffs' Counts I and II do not allege the involvement of a State official or other State actor. Therefore, the second element essential to a Section 1983 action is absent. The trial court correctly held that Counts I and II failed to state a cause of action under Section 1983.

A.

THE ALLEGATIONS OF COUNTS I AND II CANNOT SUPPORT A FINDING OF STATE ACTION REQUISITE TO A CAUSE OF ACTION UNDER SECTION 1983.

Each of the defendants charged with liability in this litigation is a private party. Citibank is a business which is presumably

authorized to and does conduct business within the State of Illinois. Wilk and Waller are attorneys, licensed by the State of Illinois to practice law. The Kadet defendants are private individuals engaged in the enterprise of serving summons and subpoenas, commonly known as private process servers. Plaintiffs concede that each of the defendants is a private entity. It is the plaintiffs' position that "misuse of State Statutes" subjects private actors to potential liability under Section 1983 (plaintiffs' petition, page 16). This is clearly contrary to the holdings of the United States Supreme Court.

To support a 1983 action, a plaintiff must show that the deprivation of a Federal right is fairly attributable to the State. A determination of fair attribution or State action is two-fold.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a State actor. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 102 S. CT. 2744, 2753 (1982).

State action is not established by a showing that the State acquiesced in a private action. Where the act of a private party is at issue, the conversion to State action is made only where the statutory scheme of the State has compelled the private action (*Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978)), or where the private party conspired with or acted in concert with State officials. *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970).

Plaintiffs' contention that private misuse of a State Statute does come within the scope of 1983 is clearly erroneous. The Supreme Court of the United States has expressly addressed the issue stating that ". . .private misuse of a State Statute does not describe conduct that can be attributed to the State,. .". *Lugar v. Edmonson Oil Company, Inc.*, 457 U.S. 937, 941 (1982). The court's statement was simply a reiteration of the principle that a constitutional right is only protected against infringement by the government. As the Supreme Court stated in *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 349 (1974):

> In 1883, this court in the *Civil Rights Cases,* 109 U.S. 3 [3 S. Ct. 18, 27 L. ED. 835], affirmed the essential dichotomy set forth in [the 14th] amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, "however discriminatory or wrongful" against which the Fourteenth Amendment offers no shield.

The logic is clear. Because the rights protected by the Constitution are protected against deprivation by the government, private individuals do not come within the scope of Section 1983. Plaintiffs' insistence that the Chancery Court in the case at bar misunderstood the scope of Section 1983 and the rationale of the United States Supreme Court cases which interpret it is clearly wrong.

The plaintiffs place heavy reliance on a series of New York cases arising in the early 1970s at the District Court level. The trial court in the case at bar reviewed that line of cases but found their holding implicitly overruled by the consistent later decisions of the United States Supreme Court, which stringently defines the requisites for State action.

The private process server, under applicable Illinois procedural rules, is appointed by the court to serve process. His actions, however, are not thereby controlled by the State, and he attains no official status. His appearance to the outside world carries no indicia of government power. The connection to the State is less than the government appointed public defender found not to be a state actor in *Polk County v Dodson,* 454 U.S. 312 (1981). It is also more tenuous than that asserted in *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982), wherein the United States Supreme Court effectively rejected the public function doctrine as applied in the series of New York cases on which plaintiff relies. The pertinent question is not whether a function which serves the public is being performed. Nor is it controlling that the function is publicly funded. *Blum v. Yaretsky,* 457 U.S. 991 (1982). The proper inquiry in determining State action is whether the function is the *exclusive* prerogative of the State.

Illinois law allows for the service of process by a private person under the current Code provisions. Ill. Rev. Stat. ch. 110, par. 2-202 (1982). Moreover, service of process by a private person

has been contemplated by the Illinois law since 1872. See Ill. Rev. Stat., ch. 110, par. 2-202, Historical Practice Notes.

The case law on which the plaintiffs rely in urging a violation of Section 1983 is outdated. The United States Supreme Court specifically outlines a more stringent approach in analyzing the scope of Section 1983. The trial court properly followed the dictates of the United States Supreme Court and rejected the case authority from the federal district level in holding that plaintiffs' allegations failed to support a finding of State action.

B.

AN ATTORNEY'S ELECTION TO USE A PRIVATE PROCESS SERVER IS ROUTINE AND CANNOT QUALIFY AS STATE ACTION.

Count I labels itself a conspiracy Count. The conclusory nature of the conspiracy allegations will be addressed in the next section of argument. Count II charges each of the defendants individually with a Section 1983 violation. An analysis of that Count with regard to these defendants must focus on their individual actions as attorneys only.

The retention of a private process server is common in the course of litigation. The private process server is used not only for the initial service of summons, but is also retained to serve a deposition subpoena on a witness, or a trial subpoena. The most common use of a private process server in Cook County litigation is for the procurement of records. In virtually every pending action in Cook County, records are procured through the use of a private service, with the server initiating the issuance of the subpoena and following through with the obtainment of records, generally from individuals or companies otherwise uninvolved in the action.

The Illinois attorney is licensed by the State. Those attorneys involved in litigation work within the court system on a daily basis. To pursue or to defend pending litigation, the attorney necessarily interacts with a series of State-employed individuals. It can not be the law that the actions the attorney takes in the course of litigation subject him to potential liability under Section 1983, because of his daily involvement in the court system. Case authority would indicate to the contrary. The conduct of an attorney following the ordinary course of litigation can not be

characterized as State action, even if abuse of the litigation procedure is alleged. *Dahlberg v. Becker,* 748 F.2d 85 (1984). The principle remains applicable even where the attorney is paid by the State. *Polk County v Dodson,* 454 U.S. 312 (1981).

The logic of holding Section 1983 inapplicable to the actions of an attorney is well-founded. To hold otherwise would subject each practicing attorney to potential liability for every court procedure initiated. The liability created would encompass any defective service of process. For example, it would potentially create a Section 1983 action for every Illinois resident a plaintiff improperly attempts to serve *via* the Illinois Secretary of State under the Motor Vehicle Code, a form of service which is only valid on a non-resident. The potential scope of a violation of Section 1983 would not be thus limited. Even a defective notice of motion would fall within its ambit.

The application of Section 1983 is properly limited. It does not and can not apply to the actions of attorneys handling litigation. As every practitioner is aware, service of process is not always letter perfect. It can be served on the wrong corporate entity, to the wrong residence or even the wrong person with the same name as the defendant sought. Section 1983 was not designed to cover the possible irregularities which arise during the course of litigation. *Accord, Lynk v. LaPorte Superior Court No. 2,* 789 F. 2d 554, (1986). The Illinois Code of Civil Procedure was so designed and its provisions outline the various avenues of relief.

Count II of plaintiffs' First Amended Complaint focuses on the individual actions of attorneys engaged in the practice of law. Their actions can never qualify as State action, as that term is defined by the United States Supreme Court. The trial court's dismissal of the 1983 action against them was proper.

C.

COUNT I IS DEVOID OF FACTS TO SUPPORT PLAINTIFF'S CONCLUSORY ALLEGATION OF CONSPIRACY.

Illinois is a fact pleading State. *Knox College v. Celotex Corp.,* 88 Ill.2d 407 (1981). Illinois law will not accept conclusory allegations in a pleading. In reviewing the sufficiency of a Complaint, the court must look to the facts alleged and not the

conclusions of law contained therein. *Gartley v. Chicago Housing Authority,* 28 Ill. App.3d 705 (1975). The trial court properly applied the Illinois pleading standard in reviewing plaintiffs' Count I and holding it factually insufficient with regard to the allegations of conspiracy.

Plaintiffs' allegations that a conspiracy existed amongst the various defendants charged is set forth in wholly conclusory terms. Plaintiffs do not deny that they fail to support their allegations of conspiracy with allegations of fact. Rather, plaintiffs urged the Illinois courts to focus on the alleged individual actions of each of the defendants charged and work backwards to infer an agreement. The standards of Illinois pleading clearly require more.

Conspiracy is a precise term. It requires actual agreement before the execution of the act agreed upon. Factual allegations to support an agreement are absent in the case at bar. Merely conclusory allegations are insufficient. *Panorama of Homes, Inc. v. Catholic Foreign Missions Society, Inc.,* 84 Ill. App.3d 142 (1980). Plaintiffs are incorrect in asserting that a conspiracy can be inferred. *Skolnick v. Nudelman,* 71 Ill. App.2d 424 (1968). Conspiracy, means something more than the opportunity to correct the possible error of another. The term encompasses an intentional agreement to do harm and an execution of that agreement. The facts alleged by the plaintiffs are insufficient to support conspiracy.

Plaintiffs assert that mere use of the court system is sufficient to support the charge of conspiracy, relying on *Mabe v. City of Galveston Park,* 635 F.Supp. 105 (1986). The holding of Mabe defeats plaintiffs' argument. The *Mabe* court explicitly states that "merely resorting to court" is insufficient to constitute conspiracy. 635 F.Supp. 108. Like the Illinois law, federal law requires an agreement before the fact to support a charge of conspiracy.

It is significant that the trial court extended plaintiffs the opportunity to plead over and buttress their conclusory allegations with additional allegations of fact. Plaintiffs elected not to tender a second amended pleading. In electing to stand on their First Amended Complaint, plaintiffs effectively advised the Trial Court that they could plead no further facts. The Trial Court correctly held their charge of conspiracy to be factually insufficient.

CONCLUSION

Review of the decision of the First District Appellate Court is not warranted. The issue on which this case was decided was procedural in nature. The rules of law followed by the Chancery Court and the First District Appellate Court are well accepted. A litigant must follow the codified rules of civil procedure in conducting civil litigation. A litigant is not allowed to shop for a judge or a forum. Finally, a trial court is not empowered to sit as a court of review. The power to review a trial court's decision is limited to the Appellate Courts and Supreme Court of the State of Illinois.

No question of federal or constitutional law is posed by the instant appeal. There are no conflicts between the decision rendered by the First District Appellate Court and any decision of this Supreme Court. Plaintiffs' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

Section 2-301 **Special appearance.** (a) prior to filing any other pleading or motion, a special appearance may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person of the defendant. A special appearance may be made as to an entire proceeding or as to any cause of action involved therein. Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance.

(b) If the reasons for objection are not apparent from the papers on file in the case, the special appearance shall be supported by affidavit setting forth the reasons. In ruling upon the objection, the court shall consider all matters apparent from the papers on file in the case, affidavits submitted by any party, and any evidence adduced upon disputed issues of fact. No determination of any issue of fact in connection with the objection is a determination of the merits of the case or any aspect thereof. A decision adverse to the objector does not preclude the objector from making any motion or defense which he or she might otherwise have made.

(c) If the court sustains the objection, an appropriate order shall be entered. Error in ruling again the defendant on the objection is waived by the defendant's taking part in further proceedings in the case, unless the objection is on the ground that the defendant is not amenable to process issued by a court of this State.

Ill. Rev. Stat., ch 110, par. 2-301 (1982)

Section 2-1301 **Judgments - Default - Confession.**

(portions deleted)

(e) The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable. Ill. Rev. Stat., ch 110, par. 2-1301(e) (1983)

Section 2-1401 **Relief from judgments.** (a) Relief from final orders and judgments, after 30 days from the entry thereof, may

be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. There shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(c) The petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

(d) The filing of a petition under this Section does not affect the order or judgment, or suspend its operation.

(e) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment.

(f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief. Ill. Rev. Stat., ch. 110, par. 2-1401 (1982)

Section 2-1601 **Scire facias abolished.** Any relief which heretofore might have been obtained by scire facias may be had by employing a petition filed in the case in which the original judgment was entered, and notice shall be given in accordance with rules.

Ill. Rev. Stat., ch. 110, par. 2-1601 (1982)

(3)

No. 90-1224

Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

MARK J. CONTRERAS, DONNA A. CONTRERAS, and ROBERT SCHMIDT,

Petitioners,

v.

CITIBANK (SOUTH DAKOTA), a National Banking Association, WILK & WALLER, an Illinois Partnership, RANDY KADET, SCOTT MARKS, MARILYN KADET, and ACCURATE PROCESS SERVICE,

Respondents.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois First Judicial District

CERTAIN RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Does this Court have jurisdiction to grant a writ of *certiorari* where no federal question was implicated by the court rendering the decision sought to be reviewed?

2) Individuals were sued to collect delinquent credit card account balances which they admittedly owed. After default judgments were entered against them, the individuals voluntarily paid those judgments and stipulated to dismiss all actions pending against them resulting from the default judgments. While two of the individuals' cases were still pending, each of them filed a separate lawsuit in a court of concurrent jurisdiction seeking to set aside the judgments on allegations of a lack of personal service upon them. Under such circumstances, did the court properly affirm the dismissal of the subsequent complaint when Illinois law requires that any challenge to the legitimacy of a judgment be made only in the court which entered the judgment?

3) Do the actions of private process servers or the attorneys hiring them in filing and completing allegedly false returns or affidavits of service constitute state action on the part of those individuals?

4) Does the filing of a purportedly false affidavit or return of service by a private process server in direct violation of Illinois law governing service of process constitute a "random and unauthorized" act by, or in conspiracy with, state officials?

QUESTIONS PRESENTED – Continued

5) Do Illinois remedies providing for relief from improperly-entered judgments provide all the due process required under 42 U.S.C. Section 1983 and the Fourteenth Amendment?

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STATUTES INVOLVED

In addition to 42 U.S.C. Section 1983 set forth in Petitioners' Brief at Page 3, the following federal statutes and provisions from the Illinois Code of Civil Procedure are relevant to this Petition.

***Ill.Rev.Stat.*, ch. 110, ¶ 2-202 – Persons Authorized to Serve Process – Place of Service – Failure to Make Return.**

(a) Process shall be served by a sheriff, or if the sheriff is disqualified, by a coroner of some county of the State. A sheriff of a county with a population of less than 1,000,000 may employ civilian personnel to serve process. In counties with a population of less than 1,000,000, process may be served, without special appointment, by a person who is licensed or registered as a private detective under the Private Detective, Private Alarm and Private Security Act of 1983 or by a registered employee of a private detective agency certified under that Act. A private detective or licensed employee must supply the sheriff of any county in which he serves process with a copy of his license or certificate; however, the failure of a person to supply the copy shall not in any way impair the validity of process served by the person. The court may, in its discretion upon motion, order service to be made by a private person over 18 years of age and not a party to the action. It is not necessary that service be made by a sheriff or coroner of the county in which service is made. If served or sought to be served by a sheriff or coroner, he shall endorse his or her return thereon, and if by a private person, the return shall be by affidavit.

***Ill.Rev.Stat.*, ch. 110, ¶ 2-203 – Service on Individuals.**

a. Except as otherwise expressly provided, service of summons upon an individual defendant shall be made (1) by leaving a copy thereof with the defendant personally, or (2) by leaving a copy at the defendant's usual place of abode, with some person of the family, of the age of 13 years or upwards, and informing that person of the contents thereof, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode. The certificate of the officer or affidavit of the person that he or she has sent the copy in pursuance of this Section is evidence that he or she has done so.

b. The officer, in his or her certificate or in a record filed and maintained in the Sheriff's office, or other person making service, in his or her affidavit or in a record filed and maintained in his or her employer's office, shall (1) identify as to sex, race and approximate age the defendant or other person with whom the summons was left, and (2) state and place where (whenever possible in terms of an exact street address) and the date and time of the day when the summons was left with the defendant or other person.

c. Any person who knowingly sets forth in such certificate or affidavit any false statement, shall be liable in civil contempt. Where the court holds a person in civil contempt under this Section, it shall award such damages as it determines to be just and where the contempt is prosecuted by a private attorney, may award reasonable attorneys fees.

Ill.Rev.Stat., **ch. 110, ¶ 2-301 – Special Appearance.**

a. Prior to filing any other pleading or motion, a special appearance may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person of the defendant. This special appearance may be made as to an entire proceeding or as to any cause of action involved therein. Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance.

b. If the reasons for objections are not apparent from the papers on file in the case, the special appearance shall be supported by affidavit setting forth the reasons. In ruling upon the objection, the court shall consider all matters apparent from the papers on file in the case, affidavits submitted by any party, and any evidence adduced upon disputed issues of fact. In their determination of any issues of fact in connection with the objection is a determination of the merits of the case or any aspect thereof. A decision adverse to the objector does not preclude the objector from making any motion or defense which he or she might otherwise have made.

c. If the court sustains the objection, an appropriate order shall be entered. Error in ruling against the defendant on the objection is waived by the defendants taking part in further proceedings in the case, unless the objection is on the ground that the defendant is not amenable to process issued by a court of this State.

Ill.Rev.Stat., **ch. 110, ¶ 2-1301 – Judgments – Default – Confession.**

a. The court may in its discretion, before final order or judgment, set aside any defaults,

and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable.

***Ill.Rev.Stat.*, ch. 110, ¶ 2-1401 – Relief from Judgments.**

a. Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of Error *Coram Nobis* and *Coram Vobis*, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. There shall be no distinction between actions or other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

b. The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by Rule.

c. The petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

d. The filing of a petition under this Section does not effect the order or judgment, or suspend its operation.

e. Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not effect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor effect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based upon the order or judgment.

f. Nothing contained in this Section effects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.

***Ill.Rev.Stat.*, ch. 110A, ¶ 301 – Method of Review.**

Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding. All rights that could have been asserted by appeal or writ of error may be asserted by appeal. No formal exception may be taken in order to make any ruling or action of the court reviewable.

Rule 17 of the Rules of the Supreme Court of the United States Considerations Governing Review on *Certiorari*.

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will

be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

* * *

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or federal court of appeals has decided an important question of law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

28 U.S.C. Section 1257 – State Courts; Appeal; Certiorari.

Final judgments or decrees entered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

These Respondents object to Petitioners' Statement of the Case as it fails to set forth several vital facts which required the dismissal of their suit. Consequently, Respondents offer the following statement.

A. The Municipal Court Proceedings.

Petitioners are indeed former credit card account holders of CITIBANK who had become delinquent in their accounts due to their refusal to make payments on their outstanding balances. After unsuccessful efforts to obtain payment from Petitioners for the sums due, CITIBANK hired WILK & WALLER to act as their attorneys and to file suit on their behalf against Petitioners. When the original summonses were returned unserved by the Sheriff, Petitioners were served by certain Respondents as special process servers. Following their failure to appear in court, default judgments were entered against them (App. 2).

With regard to Petitioner SCHMIDT, judgment by default was entered on May 19, 1987, and wage garnishment proceedings were instituted shortly thereafter (App. 3). Before the wage deduction summons was returnable to the court (on August 26, 1987), SCHMIDT voluntarily paid the judgment amount, and on July 10, 1987, a Release of Judgment was filed indicating that full satisfaction and payment had been received from SCHMIDT. A Stipulation by the parties to dismiss the garnishment was filed on August 18, 1987 (App. 3-4).

With regard to Petitioners CONTRERAS', the case history becomes more complex. On August 25, 1987, the Municipal Court entered a default judgment against them (App. 2). CONTRERAS' then appeared in Municipal Court on September 24, 1987, and filed a Motion to Vacate the judgment. Additionally, the CONTRERAS' filed a Petition for Rule to Show Cause against the process servers pursuant to the Illinois Code of Civil Procedure (App. 4). On October 1, 1987 the Municipal Court held a hearing on the CONTRERAS' Motion to Vacate. After hearing argument and expressing its displeasure with CONTRERAS' motion, specifically the acknowledgment that they had no meritorious defense to the collection action, the court continued the hearing to October 15, 1987 at 2:00 p.m. (App. 12-17). On October 13, 1987, they requested leave to withdraw the Petition for Rule to Show Cause (App. 4).

Then, at 1:18 p.m. on October 15, 1987, CONTRERAS' filed the present law suit in the Chancery Division of the Circuit Court of Cook County, Illinois (App. 4). Over forty minutes later, the CONTRERAS' appeared in the Municipal Division of the Circuit Court on their still-pending motions in the *Citibank v. Contreras* action (App. 4). Without informing CITIBANK's counsel (WILK & WALLER) that they had filed a separate lawsuit earlier that day in the Chancery Division, Mr. Regulski, the CONTRERAS' attorney, tendered his own personal check to WILK & WALLER to pay in full the outstanding balance owed to Citibank. (App. 4). Mr. Regulski then presented a *typewritten* agreed order dismissing the *Citibank v. Contreras* case and withdrawing all previously filed motions in that case.

B. The Chancery Court Proceedings.

Petitioners' complaint was designated as a "class action" lawsuit. No class was ever certified, and moreover, Petitioners had specifically excluded themselves from membership in any class the complaint attempted to define. The complaint requested that the Chancery Division vacate and declare void the judgments rendered in the Municipal Division.

Respondents filed motions to strike the original complaint and to disqualify Mr. Regulski as a result of his involvement in the scheme to engineer the present lawsuit. The motions also asserted that Petitioners had submitted to the jurisdiction of the Municipal Court when they voluntarily settled their lawsuits and by moving (in the CONTRERAS' case) to vacate the judgment.

Chancery Court Judge Albert Green dismissed the complaint *sua sponte*, pointing out that the Chancery Division

> . . . is not a Court of Appeals . . . [and] the plaintiffs cannot ask this court to vacate the judgments in the Municipal Court or declare them void.
>
> App. 19.

Judge Green denied Petitioner's Motion for Reconsideration, instructing Petitioners that a motion for relief from the judgment should have been filed in the Municipal Court proceedings pursuant to Section 2-1401 of the Illinois Code of Civil Procedure.

Ignoring Judge Green's instructions, Petitioners filed an amended complaint, purporting to allege causes of

action for conspiracy to violate their civil rights in violation of 42 U.S.C. Section 1983, a violation of their civil rights, common law fraud, a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, purported causes of action under the Illinois Code of Civil Procedure, and negligent hiring and failure to supervise (App. 6). In each separate claim, Petitioners demanded in their prayer for relief that the judgments of the Municipal Court be vacated and declared void. Additionally, Petitioners claimed entitlement to $2,500,000 in compensatory damages and $5,000,000 in punitive damages (App. 8).

Respondents again each moved to dismiss the amended complaint on the basis that Petitioners were using the Chancery Division as a means of launching an improper collateral attack against the judgments rendered by the Municipal Court, a court of concurrent jurisdiction, and that each of the separate counts failed to state causes of action. Pursuant to these motions, the court dismissed the amended complaint on July 26, 1988, finding that (1) Petitioners were attempting to skirt the appropriate procedures for attacking the Municipal Court judgments by bringing a concurrent action in the Chancery Court, (2) there was no state action present (3) the amended complaint failed to allege the elements necessary to establish fraud, (4) there was no independent cause of action based on alleged violations of the Illinois Code of Civil Procedure, and (5) the amended complaint failed to allege sufficient facts establishing a cause of action for negligent hiring and supervision (App. 6-7).

C. The Appellate Court Proceedings.

Petitioners chose to stand on Count I of their original complaint and their amended complaint and appealed to the Illinois Appellate Court (App. 7). The Appellate Court found that Petitioners were simply "forum shopping" and that Petitioners refused to pursue the avenues for relief from judgments provided under the Illinois Code of Civil Procedure (App. 8-10). The Illinois Supreme Court declined to hear Petitioners' appeal (App. 11), and Petitioners have thus filed the instant Petition for Writ of *Certiorari*.

REASONS FOR DENYING THE WRIT

Petitioners have confined their Petition to challenges on the Illinois courts' refusals to allow them to circumvent the procedures provided in the Illinois Code of Civil Procedure for obtaining relief from judgments by dismissing their complaints (and upholding those dismissals) on the grounds that Petitioners were "forum shopping", and attempting to improperly collaterally attack judgments entered in a court of concurrent jurisdiction; Petitioners also contest the rejection of their Section 1983 claims, choosing to now characterize their entire case as being of constitutional dimension.

Petitioners are simply seeking to have any forum other than the Municipal Department of the Circuit Court of Cook County vacate judgments entered against them by that court – on amounts which they admit that they owed – and then award them $7,500,000. They have

attempted – and have repeatedly failed – to state a myriad of causes of action from constitutional deprivations to violations of the Illinois Code of Civil Procedure, and even common-law causes of action.

For the reasons set forth below and for those set forth in the Brief filed by the other Respondents, the Petition for Writ of *Certiorari* should be denied.

A. THIS COURT LACKS JURISDICTION PURSUANT TO 28 U.S.C. SECTION 1257(3).

These Respondents object to Petitioners' assertion that this Court has jurisdiction pursuant to the provisions allowing for review by way of Writ of *Certiorari* under 28 U.S.C. Section 1257(3). Rule 17 of the rules of the Supreme Court of the United States governs situations under which the Court may review a matter on a writ of *certiorari*. Rule 17 specifies that the Court may exercise its discretion to review a case on a writ of *certiorari* when a state court "of last resort" has decided a federal question in a manner which is inconsistent with cases decided by this Court. S. Ct. R. 17.1(b) and (c).

As a review of the history of this case makes clear, Petitioners' various causes of action have been repeatedly dismissed and rejected on the grounds that they constituted an improper collateral attack on the judgments rendered in the Municipal Court. Initially, the Chancery Court dismissed the original complaint, *sua sponte*, on this basis and denied Petitioners' motion for reconsideration for the same reasons. Then, the Chancery Court again dismissed Petitioners' amended complaint, finding that,

> . . . by way of the nature of the relief prayed for, returning sums obtained through "void" judgments, plaintiff[s] continue to ask this court for relief which it is not empowered to grant. That is a determination that the default judgments rendered in the municipal division are void. This is akin to vacating those judgments.
>
> For these reasons this court will dismiss plaintiff's First Amended Complaint.
>
> Once more, listen to me carefully, I am going to grant you the right to file a Second Amended Complaint to see if you can meet muster. This case, if you can meet muster, should be transferred to the court of original jurisdiction wherein the judgments were granted.
>
> App.23

The court also stated additional grounds for dismissing Petitioners' Amended Complaint, although it is clear that the underlying basis for dismissal was rejection of Petitioners' collateral attack.

Indeed, the Appellate Court denied Petitioners' appeal solely on the basis that Petitioners were forum shopping and had failed to seek relief from the questioned judgments in the manner provided by the Illinois Code of Civil Procedure. Thus, it is clear that the Illinois Appellate Court opinion – the final decision from which Petitioners seek relief – did not address in any regard, or reach or pass upon any substantial federal question. Where "an independent and adequate state ground" formed the basis for dismissal of the suit, despite the possibility of reaching a federal question, the Court is "without power to hear the constitutional question." *Orr v. Orr*, 440 U.S. 268, at 274-276 (1979).

Further, in *Michigan v. Tyler*, 436 U.S. 499 (1978) the Court stated:

> Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, . . .
>
> – *Id.*, at 512, n.7.

The Illinois Appellate Court ruling was based entirely on procedural impropriety, and not regarding the sufficiency of Section 1983 claims. The absence of any federal question legitimately raised by the Petition for Writ of *Certiorari* deprives this Court of jurisdiction pursuant to 28 U.S.C. Section 1257 (3) and Rule 17 of the Rules of the Supreme Court of the United States.

In the event this objection to this Court's jurisdiction is rejected, the following arguments are offered in opposition to the Petition for Writ of *Certiorari*.

B. THE FACTS ALLEGED BY PETITIONERS DO NOT CONSTITUTE STATE ACTION BY RESPONDENTS.

To state a claim under 42 U.S.C. Section 1983, Petitioners must establish that Respondents "acted under color of state or territorial law". *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Although Petitioners allege that Respondents acted "under color of law" (First Amended Complaint, ¶¶ 12-13) the additional facts asserted illustrate that the "state action" requirement of Section 1983 and the Fourteenth Amendment has not been satisfied.

Merely private conduct, no matter how improper, is insufficient to invoke the protection of the Fourteenth

Amendment. *Shelley v. Kraemer*, 334 U.S. 1 (1948). In the instant case, Respondents ACCURATE, RANDY KADET, MARILYN KADET and SCOTT MARKS engaged in the private enterprise of providing services as special process servers. This private conduct does not constitute state action. Moreover, an attorney's actions in representing his clients do not constitute state action. *Polk County v. Dodson*, 454 U.S. 312 (1981). In the present case, these Respondents worked exclusively as agents for private attorneys, and therefore it follows that they are not state actors.

1. Respondents ACCURATE, KADET, and MARKS Did Not Perform a "Public Function" Transforming Their Private Conduct into State Action.

Regardless of how Petitioners now choose to characterize and tailor their claims, their complaints specifically allege that Respondents "RANDY KADET or SCOTT MARKS performed a state function", thereby satisfying the state action requirement of Section 1983 (First Amended Complaint, ¶54).

In only a few, limited circumstances has this Court found state action in cases where the defendant was performing a public function. The "public function test" requires that the defendant's acts be historically and traditionally governmental in nature and "the exclusive prerogative of the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). *Accord, Rendell-Baker v. Kohn*, 457 U.S. 380 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

In the present case, Respondents' acts were not historically left exclusively to the state, and in fact, Section 2-202 of the Illinois Code of Civil Procedure provides that a court may appoint a "private person" for the service of process. *Ill.Rev.Stat.*, ch. 110, ¶2-202(a). Moreover, Illinois has provided for the service of process by private individuals since 1872, about as long as the Fourteenth Amendment has existed. *See*, S.H.A., ch. 110, ¶2-202(a), Historical Practice Notes.

In arguing that a private business performing special process service constitutes state action under the public function test, Petitioners cite New York state and federal case law which consists entirely of out-dated lower court decisions. *See*, Petitioners' Brief, pp. 22-25.

The time period of the cases cited by Petitioners is significant. An analysis of the cases decided by this Court in the last twenty years reveals a marked turnaround in the approach taken by the Supreme Court after the appointment of Warren E. Burger as Chief Justice. It is important to note that the post-Warren Court has *never* found state action to exist under the public function doctrine, and in fact, on numerous occasions, reversed decisions from the Second Circuit – the very circuit providing the basis of authority for Petitioner's argument – by holding that no state action was present.

This result can be traced directly to the strict approach adopted in *Jackson v. Metropolitan Edison Co., supra*, in which the Court, in a conscious attempt to greatly reduce the purview of the public function doctrine, added the stringent requirement that not only must

the questioned act be a function which has been historically and traditionally governmental in nature, but also, that the function has been "exclusively reserved to the State". 419 U.S., at 352.

Following the hard line articulated in *Jackson*, the Court has continued to reject the public function test, requiring that in order to meet the requirements of the public function doctrine, it is imperative that the function be one that is historically left *exclusively* to the state. *Flagg Bros. v. Brooks, supra; Rendell-Baker v. Kohn, supra; Blum v. Yaretsky, supra.* Indeed, the public function test is now clearly viewed with disfavor.

Despite the obvious contrary evolution of the public function doctrine under Supreme Court directives, Petitioners desperately rely on lower court decisions from forums with stark paucity of precedential value in the wake of this Court's rulings in *Jackson* and its progeny.

> These decisions sent out clear messages to the lower federal courts as to how the state action test should be applied. Therefore, in evaluating the decisional law in this area, one must consider the continued validity of older precedents in light of these more recent developments. Pre-Burger Court lower courts' decisions in which state action was found might not be decided the same way under the Supreme Court's present approach.
>
> Schwartz and Kirklin, *Section 1983 Litigation*, 102 (1986).

To further illustrate the glaring deficiency in Petitioners' analysis, consider their reliance on *United States v. Barr*, 295 F.Supp. 889 (S.D.N.Y. 1969). Petitioners cite

Barr for the proposition that when a special process server performs a function of the sheriff, state action is present under the public function doctrine (Petitioners' Brief, p. 24). However, much more recently, in accordance with this Court's rulings, the United States Court of Appeals for the 9th Circuit in *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 967 (1981), held that an association of private citizens acting as the sheriff's posse did not constitute state action, despite obviously performing a function of the sheriff. *Canlis* further demonstrates that the post-Warren Supreme Court decisions have effectively invalidated each of those cases relied upon by Petitioners. *Canlis* also indicates that the lower federal courts are now following the Supreme Court in giving the public function test a very narrow interpretation.

Following these recent rulings, Respondents' performance of their duties as special process servers and attorneys did not constitute state action.

2. Petitioners Misapply The Joint Participation Test In An Effort To Establish State Action On The Part Of Respondents.

Although Petitioners' amended complaint specifically alleges state action only on the basis of the public function doctrine, they now attempt to employ the joint participation test as well. In support, Petitioners rely heavily on *Lugar v. Edmonson Oil Co.*, 457 U.S. 22 (1982). However, *Lugar* is misapplied by Petitioners.

The Court in *Lugar* made it clear that the joint participation test shall apply solely to deprivations under Section 1983 caused by improper prejudgment attachments of property, which is obviously not an issue in this case. In listing the various tests to determine whether state action is present:

> . . . The Court has articulated a number of different factors or tests in different contexts; e.g., the "public function" test, (citations omitted); the "state compulsion" test, (citation omitted); the "nexus" test (citations omitted); and *in the case of prejudgment attachments*, a "joint action test," *Flagg Brothers*, 436 U.S., at 157, 98 S.Ct., at 1734.
>
> *Lugar, supra*, at 939. (Emphasis added.)

In a corresponding footnote, the Court further clarified the narrow scope of its holding:

> Contrary to the suggestion of Justice Powell's dissent, we do not hold today that "a private party's mere invocation of state legal procedures constitutes 'joint participation' or 'conspiracy' with state officials satisfying the Section 1983 requirement of action under color of law." [citation omitted]. The holding today, as the above analysis makes clear, is *limited to the particular context of prejudgment attachment*.
>
> *Id.*, at 940, n.21. (Emphasis added.)

The Court could not have made it more clear that its ruling in *Lugar* and the joint participation test are to apply only to cases involving prejudgment attachments of property. Therefore, Petitioners' reliance on this test and *Lugar* are inappropriate under the facts alleged.

Moreover, the language used in *Lugar*, in analyzing the joint participation test, eliminates any possibility of finding state action by Respondents. In determining that the petitioner in *Lugar* failed to state a cause of action under Section 1983 – finding instead that the complaint merely attacked private action – the Court determined that the petitioner's allegation that the respondent's actions were "unlawful" under state law was merely,

> . . . to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their private decision, . . . That respondents have invoked the statute without the ground to do so could in no way be attributed to a state rule or a state decision.
>
> *Id.* at 940.

Likewise, under the facts alleged by Petitioners here, they admit that the purported actions occurred without any governmental intervention or decision whatsoever. For example, the Amended Complaint (¶¶ 20-24) alleges that RANDY KADET made service upon DONNA CONTRERAS prior to July 13, 1987, the date on which an order appointing RANDY KADET as special process server was entered. At most, as in *Lugar*, the alleged conduct complained of is "unlawful under state law", and is therefore only private action.

Petitioners seem to propose that the misuse of a state statute by a private party constitutes state action for purposes of Section 1983. Not only is such a proposition

entirely unsupported by any of the cases cited by Petitioners, but also, it is directly contradicted by *Lugar*. Addressing this issue in *Lugar*, the Court stated:

> . . . private misuse of a state statute does not describe conduct that can be attributed to the State . . .
>
> *Id.*, at 941.

Accordingly, *Lugar* – the very cornerstone of Petitioners' argument – completely deflates the assertions of state action.

Further, in *Lugar*, the Court analyzed extensively its previous decisions in *Moose Lodge, No. 107 v. Irvis*, 407 U.S. 163 (1972), and *Flagg Brothers, supra*, both of which held that simply acting pursuant to statutory authority does not amount to state action. In *Moose Lodge*, the Court rejected a diner's Section 1983 claim against the Moose Lodge for its refusal to serve him, despite the fact that the Moose Lodge operated under authority of the State Liquor Control Board. Similarly, in *Flagg Brothers*, the Court refused to find state action where the challenged acts were statutorily authorized by the State. Summarizing these rulings, the *Lugar* Court stated:

> . . . action by a private person pursuant to [a] statute, without something more, was not sufficient to justify a characterization of that party as a "state actor".
>
> 457 U.S., at 939.

Under the reasoning suggested by Petitioners here, if a private process server commits any wrongdoing in the course of his work, he must be viewed as an agent of the State solely because he operates under statutory authority pursuant to the Illinois Code of Civil Procedure. Any

business operating under Illinois statutory authority would, according to Petitioners' argument, be acting under color of law for state actions purposes. This argument has been specifically rejected in *Moose Lodge* and *Flagg Brothers*.

In a rather off-handed fashion, Petitioners also cite *Dennis v. Sparks*, 449 U.S. 24 (1980), a joint participation case decided approximately two years prior to the narrowing of the scope of that test in *Lugar* to situations involving only prejudgment attachments of property. In *Dennis*, the Court held that the plaintiffs' allegations that the defendants conspired with a Texas state court judge in issuing an injunction against their interests asserted conduct under color of state law within the meaning of Section 1983.

Dennis, if it may still be relied upon in the wake of *Lugar*'s limiting language, is easily distinguished from the facts alleged here. In *Dennis*, the two co-conspirators allegedly participated with the judge in reaching an agreement for bribes offered in exchange for the issuance of the injunction. The Court noted that the judge was an officer of the state with whom the co-conspirators willfully participated in depriving the plaintiffs' due process. *Dennis, supra*, at 27-28. Here, there is no suggestion that any of the Respondents "willfully participated" with any state officer in conspiring to deprive Petitioners' of their civil rights. The facts alleged here merely complain of a private violation of the court's procedural rules. The facts of this case are not even remotely analogous to those present in *Dennis*, and therefore, its application here is misplaced.

C. PETITIONERS CANNOT STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983.

Among the many state law causes of action attempted to be asserted by Petitioners, they have also claimed a violation of 42 U.S.C. Section 1983, apparently contending that they have been deprived of liberty or property without due process of law.[1] Petitioners assert that their procedural due process rights were denied (as opposed to any substantive constitutional claim) when judgments were entered against them on credit card accounts which they admit they owed, without (allegedly) having been giving proper notice of the pending lawsuits against them.

1. Petitioners Are Required To Resort To State Law Remedies As The Allegations Against Respondents Assert Conduct Which Was Entirely Random And Unauthorized By The State.

Petitioners pose among their "Questions Presented for Review",

> Whether a person must exhaust all state court judicial remedies before bringing an action under 42 U.S.C. Section 1983.
>
> Petitioners' Brief, p. "i".

This court has repeatedly held that the answer to this question under claims and circumstances such as those

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[1] It is quite doubtful that Petitioners could establish the deprivation of any property interest where they admit they owed and voluntarily paid the judgment amounts entered in the trial court.

present here is "yes". *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1984); and *Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975 (1990). In those cases, this Court held that random and unauthorized deprivations of liberty or property by public officials must be redressed through state remedies, if they exist, in state forums. Therefore, even if Respondents' actions could somehow be construed as constituting state action, because those acts (as alleged) were clearly unforeseen and unauthorized by the State, Petitioners are required to resort to "post-deprivation" remedies made available by the State. *See, Easter House v. Felder*, 910 F.2d 1387, 1405-1407 (7th Cir. 1990) (*en banc*).

Here, Petitioners have set forth no facts which appear as being anything other than random and unauthorized by the State. To the contrary, they claim that Respondents acted in direct contravention of State policy and procedures. Therefore, Under *Parratt*, *Hudson*, and *Zinermon*, Petitioners' claims must be subjected to the inquiry of the availability of state-law relief.

2. The Illinois Code of Civil Procedure Provided Petitioners with Appropriate Avenues for Relief Which Were Both Adequate and Available to Them.

As each of the courts below have carefully pointed out to Petitioners, the Illinois Code of Civil Procedure sets forth the proper manner for obtaining relief from challenged judgments. Specifically, Sections 2-1301(e) and 2-1401 of the Code allow a person to challenge a judgment by returning to the court which entered it and

attack it there. Section 2-301 permits the "Special Appearance" by a party for the purpose of contesting personal jurisdiction. Further, Illinois also provides for the review of a final judgment through its appellate courts of review. *Ill.Rev.Stat.*, ch. 110A, ¶ 301. Finally, as Judge Albert Green repeatedly instructed Petitioners in the Circuit Court, they might have had a valid state law cause of action for common law fraud, if they could have properly pled such a claim. *Parratt* and *Hudson* dictate that where adequate state law remedies are available under these circumstances, no Section 1983 claim can be stated.

There has never been a finding that an individual has been denied procedural due process based upon a claimed deprivation of property or liberty where an extensive array of state procedures exists to remedy any actual deprivation, especially where the individual has chosen to abandon those remedies. Why have Petitioners tried so persistently to avoid these state remedies? The courts reached a very simple conclusion: "forum shopping", as they have correctly refused to accommodate Petitioners' misuse and rejection of Illinois' procedural rules.

Finally, it is inconceivable that individuals can claim that they have not been provided adequate due process where they have voluntarily submitted to the jurisdiction of the court by appearing there, voluntarily settling and satisfying all claims against them, and then stipulating to dismiss those actions. Even more incredible are CONTRERAS' claims in light of their having invoked their rights under Section 2-1301 by filing, arguing and voluntarily withdrawing their motion to vacate the default

judgment. Consequently, Petitioners cannot state a Section 1983 cause of action.

D. PETITIONERS' CHANCERY COURT ACTION CONSTITUTED AN IMPROPER COLLATERAL ATTACK ON JUDGMENTS ENTERED BY THE MUNICIPAL COURT.

For their Response to the portion of the Petition for Writ of *Certiorari* which asserts that the Illinois Circuit Court (Chancery Division) and Appellate Court improperly dismissed their complaints as being improper collateral attacks on the judgments, these Respondents adopt and join in those portions of the remaining Respondents' Briefs which address this issue.

CONCLUSION

The Petition for Writ of *Certiorari* fails to establish any resolution of a Federal question by an Illinois court of last resort, and therefore there is no jurisdiction to review this matter on a writ of *certiorari*. Further, Petitioners many claims were properly rejected by the Illinois courts and those rulings should not be disturbed. For these reasons, the Petition should be denied.

Respectfully submitted,

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